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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOHN MOORE,

Petitioner,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, DAVID W. GOLDE, M.D., SHIRLEY G. QUAN,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of California

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Just Compensation Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, requires a State to provide just compensation for the nonconsensual taking of economically valuable human bodily substances from a person, when those substances are subsequently exploited by the State for commercial gain.

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Thompson, Genetic Breakthroughs, 1 Editorial Res. Rep. 4 (1986) 19
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Tompkins, Capitalizing in Life, Sci. Dig., June 1986, at 33 19
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U.S. Congress, Office of Technology Assessment, New Developments in Biotechnology: Ownership of Human Tissues and Cells 27 (1987) 19
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PETITION FOR WRIT OF CERTIORARI

Petitioner John Moore respectfully prays that a writ of certiorari issue to review the orders and judgments of the Supreme Court of California entered on July 9, 1990 and August 30, 1990.[1]

OPINIONS BELOW

The July 30, 1990 opinion and judgment of the California Supreme Court is reported at 51 Cal.3d 120, 271 Cal. Rptr. 146, 793 P.2d 479, and is reprinted in the Appendix to this petition ("Pet. App.") at 1a. The August 30, 1990 order of the California Supreme Court denying the petition for rehearing is unreported, and is

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[1] The parties to the proceedings below were: petitioner; the Regents of the University of California; David W. Golde, M.D.; Shirley G. Quan; Genetics Institute, Inc.; Sandoz, Ltd.; Sandoz United States, Inc.; and Sandoz Pharmaceuticals Corporation.

reprinted in the Appendix to this petition at 95a. The decision of the California Court of Appeal is reported at 215 Cal.App.3d 709, 249 Cal. Rptr. 494 (1988).

JURISDICTION

The California Supreme Court entered an order denying petitioner's petition for rehearing on August 30, 1990. On November 16, 1990, this Court extended the time for filing the instant petition to and including December 28, 1990. Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States, which provides, in relevant part:

> Nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States, Section 1, which provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person the equal protection of the laws.

STATEMENT OF THE CASE

In 1976, John Moore was diagnosed as having a condition known as "hairy-cell leukemia."[2] He sought medical treatment at the Medical Center of the University of California, Los Angeles (UCLA Medical Center)

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[2] The California Supreme Court decided this case on a motion for demurrer. *Moore v. Regents of the University of California*, 51 Cal.3d 120, 125 (1990); Pet. App. 1a. All properly pleaded allegations in the complaint were thus accepted as true for purposes of the motion. 51 Cal. 3d at 126; Pet. App. 2a. The facts set forth in this Statement are drawn from the Complaint, which is reprinted at Pet. App. 101a.

—a state university—and was seen by Dr. David W. Golde, a physician employed by UCLA. Dr. Golde confirmed Moore's diagnosis. During Moore's subsequent hospitalization, extensive amounts of blood, bone marrow aspirate, and other bodily substances were extracted from him. Thereafter, Moore was readmitted to the UCLA Medical Center and underwent a splenectomy, recommended by Dr. Golde and others, but not performed by Dr. Golde. Moore consented to the removal of his spleen based on Dr. Golde's representation that it was a necessary part of the treatment for his disease.

Prior to the operation, without Moore's knowledge, Dr. Golde and Shirley G. Quan, a researcher employed at UCLA, had determined that Moore's cells were unique, and extremely valuable. As stated in Moore's complaint, he "possesses a unique type of blood and blood components with cells possessing unique properties, unique genetic materials, and producing unique products which in and of themselves, and when isolated, cloned or cultured through biomedical, biokenetic, and other means, have the potential for providing, and have provided, significant breakthroughs on the research and development concerning blood cancers, blood disorders, virally-related diseases, diseases of the immune system, and other conditions or disorders." Complaint ¶ 1; Pet. App. 101a-102a. *See also id.* at ¶¶ 8-12; Pet. App. 104a-105a. As a result, respondents Golde and Quan decided to obtain samples of Moore's bodily materials for research and commercial purposes. They did not, however, apprise Moore of their intent. Instead, they represented that the samples were needed for therapeutic purposes. Complaint ¶¶ 9-25; Pet. App. 104a-108a.

After the operation, without Moore's knowledge or consent, Golde and Quan obtained a portion of Moore's spleen. They utilized the spleen and samples of Moore's blood and bodily substances to grow a cell-line, composed of his cells, that is capable of producing pharmaceutical

products of enormous therapeutic and commercial value. Golde and Quan subsequently patented the cell-line—derived exclusively from Moore's tissues and composed of his cells—as well as nine products derived therefrom. They assigned the patent to the Regents of the University of California (the governmental entity that owns and operates UCLA Medical Center). Without informing Moore or obtaining his consent, and in pursuit of their research efforts and commercial ventures, Golde and UCLA Medical Center continued to monitor him and take tissue and blood samples from him every six months for almost seven years following the removal of his spleen.[3] This required Moore to travel repeatedly to Los Angeles from his home in Seattle, Washington. On each occasion, Moore made the trip based on representations that the procedures could be performed only at UCLA Medical Center under Golde's direction. Complaint ¶ 30; Pet. App. 110a.

Upon recognizing the enormous economic potential of Moore's bodily materials, Dr. Golde and Ms. Quan laid the groundwork for exploiting the economic value of the materials. In particular, they entered into contracts with Genetics Institute, Inc. and Sandoz Pharmaceuticals, which guaranteed payment of more than $400,000 over a four-year period. Dr. Golde also obtained substantial stock holdings in Genetics Institute. In return, Genetics

[3] In his complaint, Moore alleged that he did not give informed consent to the initial spleen operation because he was not informed of the intended research and commercial uses of Dr. Golde. He further alleged that the first time he gave any form of consent to the research use of his bodily materials was 7 years later—after numerous extractions of bodily material—but that the consent was not informed because Dr. Golde did not reveal the commercial potential of the materials. Moore further alleged that he refused to give consent to such use when requested to do so six months after initially consenting to the use of his bodily materials. In spite of this express lack of consent, Golde, Quan, and UCLA Medical Center continued their commercial exploitation of his cell-line.

Institute and Sandoz Pharmaceuticals gained exclusive access to Moore's bodily materials and the cell lines grown from them, and thus had the exclusive right to exploit the commercial potential of these materials.[4] No one made any effort to inform Moore of the value of his bodily materials, or to obtain his consent to the commercial exploitation of the materials that would subsequently be extracted from him.

In 1984, Moore instituted a lawsuit based on these events. His third amended complaint names Golde, Quan, the Regents, Sandoz, and Genetics Institute, as defendants, alleging causes of action for: (1) conversion; (2) lack of informed consent; (3) breach of fiduciary duty; (4) fraud and deceit; (5) unjust enrichment; (6) quasi-contract; (7) breach of implied covenant of good faith and fair dealing; (8) intentional infliction of emotional distress; (9) negligent misrepresentation; (10) interference with prospective advantageous economic relationships; (11) slander of title; (12) accounting; and (13) declaratory relief. Plaintiff alleged damages, including lost profits, and punitive damages. *See* Complaint; Pet. App. 101a.

With regard to his cause of action for conversion, plaintiff alleged that his "blood and bodily substances" (all bodily tissues, including cells, spleen, blood and genetic material) have significant commercial value because they possess unique properties with a potential for breakthroughs in medical research and the treatment of disease. He further alleged that defendants knew of this value and were aware that having access to Moore would enable them to locate, isolate and cultivate large quantities of these valuable substances, and thus would provide defendants with competitive, commercial, and scien-

[4] Complaint ¶¶ 41(p)-41(r); Pet. App. 119a. The market potential of products from Moore's cell-line was predicted to be hundreds of millions of dollars by the 1990s. Hundreds of thousands of dollars have already been paid under these agreements to the developers.

tific advantages. In light of this knowledge, plaintiff alleged, defendants formed the intent to exploit the scientific and commercial value of plaintiff's tissues prior to the splenectomy. The subsequent course of his treatment was designed to and did further defendants' research and commercial activities, unrelated to plaintiff's treatment.[5] *Id.* ¶¶ 9-63; Pet. App. 102a-122a.

Plaintiff alleged that he never knew of nor was he informed of defendants' scientific and commercial exploitation of his bodily substances. Indeed, defendants misrepresented the nature of the research to plaintiff by advising him that there was no commercial or financial value to his tissues. Plaintiff alleged that had he known what was taking place, he would not have consented to the splenectomy or later extractions for defendants' research and commercial activities; would have insisted on participating in control of his blood and bodily substances; would not have permitted these materials to be used by defendants solely for their independent research, commercial activity, and economic benefit; would have considered treatment at another medical facility where his wishes would have been carried out; and would have sought participation in the economic benefit.

Plaintiff's conversion complaint is summarized succinctly in the following allegation:

> "Plaintiff alleges that his Blood and Bodily Substances, including but not limited to his blood, blood components, by-products, bodily tissues, lymphokines, genetic material, genetic sequences, conditioned medium, spleen, sperm, bone marrow aspirate, and other substances derived from his Blood and Bodily Sub-

[5] Plaintiff alleged that while under the care of Golde and UCLA Medical Center, they engaged in a number of activities aimed at commercial exploitation of the cell-line derived exclusively from his bodily substances and composed of his cells, including entering into the agreements with Sandoz and Genetics Institute, and obtaining the various patents. None of this activity was disclosed to plaintiff.

> stances, are his tangible property, and the activities of the defendants as set forth herein constitute a substantial interference with plaintiff's possession or right thereto, as well as defendants' wrongful exercise of dominion over plaintiff's personal property rights in his Blood and Bodily Substances."

Complaint ¶ 60; Pet. App. 128a.

The California Superior Court sustained defendants' demurrers to plaintiffs' complaint. The court first addressed the demurrer jointly filed by the Regents, Golde and Quan, concluding that plaintiff's cause of action for conversion was defective for failure to make specific allegations that the defendants acted with a pre-formed wrongful intent, and because the complaint did not attach the consent forms at issue.[6] The court later dismissed the complaint as to these three defendants. Some months later, another judge sustained the demurrers of Genetics and Sandoz, concluding that there was no recognized cause of action for plaintiff's claim and declining to create one. Neither ruling was based on the conclusion that Moore lacked any property rights in his bodily materials.

The Court of Appeal for the Second Appellate District concluded that the demurrers were improperly sustained because: "the plaintiff has adequately stated a cause of action for conversion." *Moore v. Regents of the University of California*, 215 Cal.App.3d 709, 249 Cal. Rptr. 494 (1988). Citing recent California case law, the Court of Appeal observed:

> "[f]or conversion, a plaintiff need only allege: '(1) plaintiffs' ownership or right to possession of the property at the time of the conversion; (2) defendants' conversion by a wrongful act or disposition of plaintiffs' property rights; and (3) damages."

Slip op. at 17. The Court of Appeal observed that, in California, "[p]roperty is '"every species of right and

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[6] The trial court concluded that plaintiff's conversion action was incorporated into his remaining causes of action, which were therefore defective for the same reasons.

interest capable of being enjoyed as such upon which it is practicable to place a money value.'" *Id.* at 23 (quoting *Yuba River Power Co. v. Nevada Irr. Dist.*, 207 Cal. 521, 523 (1929)), and that "'ownership . . . is the right . . . to possess and use [a thing] to the exclusion of others,'" *id.* at 22 (quoting Cal. Civ. Code § 654).

The Court of Appeal then rejected defendants' "position that plaintiff cannot own his tissue, but that they can."

> "Apparently, defendants see nothing abnormal in their exclusive control of plaintiff's excised spleen, nor in their patenting a living organism derived therefrom. We cannot reconcile defendant's assertion of what appears to be their property interest in removed tissue and the resulting cell-line with their contention that the source of the material has no rights therein."

Id. at 29. Without plaintiff's cells, taken without his consent, "there could have been no . . . cell-line." *Id.* at 30.

The Court of Appeal also rejected the Regents' argument that plaintiff should be denied compensation for his cells because "*unencumbered* access to human tissue for research is essential to progress and public health." *Id.* at 33 (emphasis in original). The Court observed that the State had itself chosen a market approach to research in human cells and tissue—otherwise defendants could not have exploited plaintiff's tissue for their own enormous profit. "If this science has become science for profit, then we fail to see any justification for excluding the patient from participation in those profits." *Id.* at 35. The Court also noted the extraordinary invasion of human dignity that would be invited by the "unencumbered" right of governmental access to human tissue advocated by the Regents. *Id.* at 33.

A deeply divided California Supreme Court reversed the Court of Appeal's ruling with respect to plaintiff's

conversion claim.[7] The majority did not deny that plaintiff, and all persons in California, "own" their own tissues and cells while those tissues and cells form a part of their bodies.[8] The Court assumed for purposes of decision that defendants had taken plaintiff's tissues from him without valid consent. Yet the majority framed the issue as whether plaintiff "*retained* an ownership interest" in his tissues *after* the state actors had taken them. 51 Cal. 3d at 136-37; Pet. App. 19a (emphasis added). Having so framed the issue, the majority held that under California law, by excising plaintiff's property (albeit without his consent), the State had extinguished all plaintiff's rights to ownership of that property and transferred them to itself. Consequently, no claim would lie for conversion, through which the plaintiff might obtain compensation for the loss of biological materials that had been his property before being wrongfully excised.

The state supreme court majority advanced three explanations for this ruling. First, it could find no prior

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[7] The Court unanimously held that plaintiff's complaint stated a cause of action for breach of the physician's disclosure obligations. As discussed *infra*, such an action plainly protects a different interest than a conversion action, proceeding solely from a fiduciary obligation to obtain informed consent to a medical procedure, and not from the notion that a persons property has been converted without consent.

[8] The dissent observed without rejoinder that "under California law . . . before a body part is removed it is the patient, rather than his doctor or hospital, who possesses the right to determine the use to which the body part will be put after removal. 51 Cal. 3d at 151 (Broussard, J.); Pet. App. 42a. The majority effectively concedes this crucial point, characterizing the question for decision as whether plaintiff "*continued* to own his cells following their removal," *id.* at 134 (emphasis added); Pet. App. 16a; whether plaintiff "retained an ownership interest in them," *id.* at 136-37; Pet. App. 19a; and whether "a person retains a sufficient interest in excised cells to support a cause of action for conversion," *id.* at 137; Pet. App. 19a.

decision allowing an action for conversion of excised human tissue, although it cited no judicial decision denying such an action. *Id.* at 136-40; Pet. App. 18a-28a. Second, it maintained that California Health and Safety Code section 7054.4 "eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to 'property' or 'ownership' for purposes of conversion law." *Id.* at 141; Pet. App. 24a.[9] Third, the majority claimed that plaintiff's wrongfully seized cells and tissues "cannot be [his] property," because those tissues have now become "the subject matter of the Regents' patent." *Id.* at 141; Pet. App. 26a.[10]

In light of its ruling that plaintiff had not been deprived of a property interest by defendants' actions, the

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[9] That section provides:

> "Notwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety."

The majority did not explain how a state that requires safe disposition of materials *after* scientific use extinguishes rights to determine whether and how human tissue is used for scientific purposes. Nor did the majority explain why defendants may own defendants' tissue after they have taken it from him, if this statute extinguishes all rights of property in excised tissue. Indeed, under the majority's view, it appears, ironically, that only the *source* of the tissue is deprived of ownership rights.

[10] Because this case was decided on demurrer, the California Supreme Court's conclusion that petitioner's bodily materials lacked the attributes of property was not based on any evidentiary foundation. The court did purport to take judicial notice of scientific material supporting its view, but did so in violation of California law and basic notions of fairness. Petitioner was never afforded an opportunity to submit to the court his own views on the persuasiveness of the materials on which the court relied. Indeed, one of the articles on which the court relied was written by Respondent Golde, hardly an impartial source.

majority of the state supreme court did not reach Sandoz's contention that the Regents had taken plaintiff's rights "pursuant to their power of eminent domain." *Id.* at 147, n.44; Pet. App. 36a. Presumably for similar reasons, the Court did not address plaintiff's contention, advanced in his brief in the California Supreme Court, *see* Pet. App. 95a, that to fail to recognize a conversion action would effect a taking of plaintiff's property without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

Justices Broussard and Mosk issued separate, strenuous dissents. Justice Broussard emphasized that the majority opinion asked the wrong question:

> The majority opinion fails to recognize . . . that, in light of the allegations of the present complaint, the pertinent inquiry is not whether a patient generally retains an ownership interest in a body part after its removal from his body, but rather whether a patient has a right to determine, before a body part is removed, the use to which the part will be put after removal.

51 Cal.3d at 154; Pet. App. 46a. He rejected each of the majority's explanations for its ruling,[11] and concluded that under traditional California common law principles, defendants' fraudulent extraction, for commercial exploitation, of substances still plaintiff's property because still part of his body at the time they were taken, should give rise to an action for conversion.

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[11] Justice Broussard observed that: 1) although no decisions expressly support a conversion action in these circumstances, similarly, no decisions previously had denied the existence of such an action; 2) California Health and Safety Code section 7054.4 on its face does *not* deprive a patient of the right to choose among legally permissible uses of his body parts after their removal but prior to conclusion of scientific research on those parts; and 3) defendants' patent cannot deny plaintiff compensation for the value of raw materials mined without consent out of his body for commercial exploitation by defendants. 51 Cal. 3d at 156-57; Pet. App. 53a.

Justice Broussard concluded by observing that the effect of the majority's decision does not "elevat[e] these biological materials above the marketplace." To the contrary:

> the majority's holding simply bars *plaintiff*, the source of the cells, from obtaining the benefit of the cells' value, but permits *defendants*, who allegedly obtained the cells from plaintiff by improper means, to retain and exploit the full economic value of their ill-gotten gains free of their ordinary common law liability for conversion.

Id. at 160; Pet. App. 56a.[12]

In his petition for rehearing, Moore reiterated his claim that dismissal of his conversion action would constitute a taking of his property without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. *See* Pet. App. 98a-100a. On August 30, 1990, the California Supreme Court denied plaintiff's petition for rehearing. On November 16, 1990, this Court extended the time for the filing of this petition to and including December 28, 1990.

REASONS FOR GRANTING THE WRIT

This case presents an important issue of constitutional law that has not been, but should be, settled by this Court: whether the Just Compensation Clause of the Fifth Amendment,[13] requires a State to provide just com-

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[12] Justice Mosk reached a similar conclusion, rejecting each of the majority's purported rationales.

[13] The Just Compensation Clause of the Fifth Amendment applies to the States through the Fourteenth Amendment. *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897).

The conduct of respondents constituted state action for Fifth and Fourteenth Amendment purposes. The Regents of the University of California are a state entity, *cf. Board of Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and respondents Golde and Quan were employees of the University, and

pensation for the nonconsensual taking of economically valuable human bodily substances, when those substances are subsequently exploited by the State for commercial gain.[14]

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were acting within the scope of their duties as employees, when they committed the actions at issue in this case.

[14] Despite the California Supreme Court's failure to address the constitutional issue, petitioner's asserted Fifth Amendment violation is properly before the Court.

In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held a takings claim under the Fifth Amendment is not "ripe" until just compensation has been denied by the State. Thus, the Court explained that "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" *Id.* at 195, quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984). *Accord id.* ("[T]he State's action . . . is not 'complete' until the State fails to provide adequate compensation for the taking."). Indeed, as the Court expressly stated, "a property owner has not suffered a violation of the [Just Compensation] Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." *Id.*

Petitioner sought postdeprivation compensation through a conversion action under California common law. It was not until the State denied him this remedy—through a ruling that petitioner retained no property interest in his bodily materials extracted without informed consent—that petitioner's constitutional claim arose. *See id.* at 194 n.13 ("[N]o constitutional violation occurs until just compensation has been denied."). And the State did not deny petitioner compensation through his conversion claim until the California Supreme Court ruled, for only then was it clear that a state procedure for compensation was "unavailable." *Id.* at 197. The California Supreme Court is the final arbiter of California law, and had not previously spoken on this issue. Indeed, the lower courts adjudicating petitioner's claim did not even intimate that petitioner might lack a property interest in his bodily materials.

Thus, by asserting the Fifth Amendment issue in his brief before the Supreme Court and again in his petition for rehearing, petitioner raised his constitutional claim at the earliest appropriate

1. The California Supreme Court divided sharply over whether petitioner Moore possessed a property interest entitling him to compensation. Every member of the court agreed that petitioner possessed a property interest in his bodily substances prior to their extraction. *See* 51 Cal.3d at 136-37; Pet. App. 19a; *id.* at 151; Pet. App. 42a. The majority of the court also acknowledged that under some circumstances, "the right to control the use of excised cells does survive" removal from a person's body. 51 Cal.3d at 141; Pet. App. 25a. The court nonetheless rejected petitioner's suit for compensation. This result was not based on any finding that petitioner abandoned his interest in the excised bodily materials; such a finding was foreclosed by petitioner's properly pled allegations that the materials were removed without obtaining his informed consent. Instead, the court held as a matter of law that petitioner "retained" no "ownership interest" in his bodily materials after they had been taken without consent for scientific use and commercial exploitation by the State. *Id.* at 136-37; Pet. App. 19a.

As the dissenting Justices of the California Supreme Court demonstrated, the majority's conclusion lacked any substantial basis in either logic or law. To the contrary, the court's entire analysis rested on two obvious *non sequiturs*. The court's assertion that "California statutory law drastically limits any continuing interest of a patient in excised cells," 51 Cal.3d at 137; Pet. App. 19a, was supported by reference to state laws governing

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occasion. *See* Pet. App. 95a (brief), 98a (petition for rehearing). Indeed, petitioner raised the claim *before* it had actually ripened, since the Supreme Court had not yet ruled. *See Williamson County*, 473 U.S. at 197 (holding that until a property owner has utilized the State procedure and been denied compensation, his "taking claim is premature"). As in *Chambers v. Mississippi*, 410 U.S. 284, 290-291 n.3 (1973), "petitioner's constitutional claim . . . could not have been raised and ruled upon" prior to the California Supreme Court's decision. Thus, as in *Chambers*, this Court may properly exercise jurisdiction in this case. *See id.*

the disposal of human bodily materials "*following conclusion of scientific use*" of those materials, or upon death. *E.g.*, Health & Safety Code § 7054.4 (emphasis added); *id.* § 7054.3; Government Code § 27401.46. 51 Cal.3d at 140-41; Pet. App. 24a.[15] The issue here, of course, is whether petitioner is entitled to compensation for the taking of his bodily materials *for* scientific and commercial use, not whether petitioner retains an unrestricted right to dominion and control *after* the State has finished exploiting the commercial potential of the material.

The provisions on which the court relied do no more than direct that bodily materials be disposed of in ways consistent with public health and safety. As the court conceded, these provisions do not express a legislative intention "to resolve the question of whether a patient is entitled to compensation for the nonconsensual use of excised cells." 51 Cal.3d at 140; Pet. App. 24a-25a. Other California statutory provisions, in contrast, do explicitly recognize that individuals possess rights to control the disposition of excised bodily materials. In particular, the State's Uniform Anatomical Gift Act invests individuals with the right to control disposition of organs removed for transplantation.[16]

Furthermore, as one dissenting Justice on the California court recognized,

> [i]f . . . another medical center or drug company had stolen all of the cells in question from the UCLA Medical Center laboratory and had used them for its own benefit, there would be no question but that a cause of action for conversion would properly lie

[15] The court admitted that "[c]learly the Legislature did not specifically intend this statute to resolve the question of whether a patient is entitled to compensation for the nonconsensual use of excised cells." 51 Cal. 3d at 140; Pet. App. 24a-25a. As the court noted, a "primary object of the statute is to ensure the safe handling of potentially hazardous biological waste materials." *Id.*

[16] Health and Safety Code §§ 7150 *et seq.*

> against the thief, and the majority opinion does not suggest otherwise. Thus, the majority's analysis cannot rest on the broad proposition that a removed body part is not property, but rather rests on the proposition that a *patient* retains no ownership interest in a body part once the body part has been removed from his or her body.

51 Cal.3d at 153-54; Pet. App. 46a (Broussard, J., dissenting in part) (emphasis in original). Yet the court could point to nothing in existing California law that supported extinguishing petitioner's economic interest while preserving the right of the State "to retain and exploit the full value of their illgotten gains free of their ordinary common law liability for conversion." *Id.* at 160; Pet. App. 56a.

Nor is there any legal basis for the court's holding that petitioner retained no property interest because "the patented cell line" made from his bodily materials "is both factually and legally distinct from the cells taken from Moore's body." 51 Cal.3d at 141; Pet. App. 26a. Even if the court were correct that the mere existence of a patent precludes petitioner from asserting ownership of the patented product itself, patent law provides no factual or legal basis for precluding petitioner from recovering damages for conversion of the raw materials that went into the making of the patented product.[17] At most, the existence of the patent might conceivably limit the extent of damages to which petitioner would be entitled.

2. The ruling of the California Supreme Court raises important, unresolved issues under the Just Compensation

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[17] The court's analysis effectively transforms a patent into a safe-harbor for theft in California. Such a result is untenable, however. It is inconceivable that the converter of naturally occurring raw materials, such as minerals or chemical compounds, could defeat a conversion claim by showing that the materials were used in the production of a product for which a patent was subsequently obtained.

Clause of the Fifth Amendment. If petitioner's bodily materials are cognizable as property within the meaning of that constitutional provision, this Court's prior decisions leave little doubt that the State's actions would constitute a taking for which compensation would be required. The State of California exercised permanent, exclusive physical dominion over the bodily materials extracted from petitioner without his informed consent. In so doing, the State deprived petitioner of the "essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Petitioner lost the "right to possess," the "right to control use," and the right to exclude others from using his bodily materials. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982); *see also Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government"); *United States v. Peewee Coal Co.*, 341 U.S. 114, 116 (1951) ("actual taking of possession and control" constitutes taking).[18] Indeed, the State's action in this case is particularly suspect, because respondents Golde and Quan were acting not to advance a purely public purpose, but to further an enterprise that would generate substantial profits for them personally and for the State.

Because the court's denial of legal redress rests on the conclusion that petitioner "retained" no property interest

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[18] In its "permanence and absolute exclusivity," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982), the State's exercise of dominion over petitioner's bodily material is indistinguishable from government's physical occupation of property. This Court has

> long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred.

Id. at 426.

in bodily materials extracted without informed consent, this case squarely raises the issue whether petitioner possessed a Fifth Amendment property interest in controlling the use to which those materials would be put.[19] If petitioner has a property interest in his bodily materials, the State's nonconsensual taking of that interest without just compensation constitutes a violation of the Just Compensation Clause. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 n.70 (1981).

The property interest petitioner asserts in these proceedings bears all the indicia traditionally recognized as incident to property. It is tangible, can be possessed, can be controlled, has intrinsic economic value, and is capable of being transferred. *Cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). This interest is far from the sort of partial, speculative, or contingent claim this Court has refused to recognize as "property" for Fifth Amendment purposes. *E.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978).

Petitioner's property interest is, furthermore, based on reasonable expectations firmly grounded in the law of California, and in the common law tradition generally. California, like every other State, recognizes the right of every adult "to determine what shall be done with his own body." *Cobbs v. Grant*, 8 Cal.3d 229 (1972) (quoting *Schloendorff v. Society of New York Hospital*, 211 N.Y.

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[19] The informed consent cause of action protects petitioner's dignitary and privacy interest in controlling medical intrusions into his body.

The court's conclusion that petitioner retained no property interest in bodily materials extracted from him without his informed consent also precludes petitioner from resorting to California's inverse condemnation or eminent domain proceedings, as the court made clear. 51 Cal. 3d at 147 n.49; Pet. App. 36a.

1225, 105 N.E.92 (1914) (Cardozo, J.). California explicitly recognizes that its citizens retain a property interest in their own physical likenesses. *Lugosi v. Universal Pictures*, 25 Cal.3d 813 (1979). California statutes specifically grant to organ donors the power to control the disposition of organs removed from their bodies. *See* note 14 *supra*. Indeed, California law has long defined "property" as "every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value." *Yuba River Power Co. v. Nevada Irr. Dist.*, 207 Cal. 521, 523 (1929). Accordingly, petitioner's expectation that he could control the use of his bodily materials, and reap a reasonable return for their commercial use, was entirely reasonable.

Guidance from this Court is urgently needed as to whether the Just Compensation Clause protects the interest of citizens in the economic value of their bodily materials. Prevailing uncertainty over the extent of States' obligations to compensate individuals for property interests in bodily materials taken for scientific and commercial use is of vital concern to an industry that will generate tens of billions of dollars of profit by the end of the decade.[29] The Office of Technology Assessment of the Congress of the United States has concluded, after extensive study, that "[u]ncertainty about how courts will resolve disputes between specimen sources and specimen users could be detrimental to both academic researchers and the infant biotechnology industry," and that this uncertainty is so threatening to progress that "regardless of the merit of claims by the different interested parties, resolving the current uncertainty may be more important to the future

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[29] *See* Thompson, Genetic Breakthroughs, 1 Editorial Res. Rep. 4 (1986); Tompkins, Capitalizing in Life, Sci. Dig., June 1986, at 33; Dolnick, Spare Parts, 195 The New Republic 16 (1986); Medicine and Profits, U.S. News and World Report, Aug. 17, 1981; at 54; N.Y. Times, Mar. 9, 1987, § 1 at 1, Col. 6.

of biotechnology than resolving it in any particular way." [21]

This Court should also grant plenary review to clarify the limits on state court power to refashion state positive property law in order to deny compensation that would otherwise be constitutionally required. On the one hand, prior decisions suggest that "[p]roperty interests . . . are not created by the Constitution" but by "existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). On the other hand, this Court has repeatedly held that "a sovereign, 'by *ipse dixit*, may not transform private property into public property without compensation.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984) (*quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)). In evaluating a state court holding that a party possesses no property interest for Just Compensation Clause purposes, "it is the province of this Court to inquire whether the decision of the state courts rests on a fair or substantial basis." *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944).

As in *Webb's Fabulous Pharmacies*, the state court's rejection of petitioner's claimed right to compensation in this case was little more than *ipse dixit*: the court deprived petitioner of the right to control the use to which his bodily materials would be put—an essential element of the "bundle of rights" constituting property—at a time when petitioner retained an undisputed property interest in the materials under California law because they were still part of his body. That result is—as the dissenting state Justices demonstrated—so at odds with existing expectations generated by California law that it can stand only if

[21] U.S. Congress, Office of Technology Assessment, New Developments in Biotechnology: Ownership of Human Tissues and Cells 27 (1987).

state courts possess absolute authority to determine the dimensions of property interests cognizable under the Fifth Amendment. This Court's decision in *Webb's Fabulous Pharmacies* suggests that the state court cannot constitutionally possess such authority.[22]

Resolution of this issue is a matter of pressing importance not only for this case, but also for takings jurisprudence generally. The breakneck progress of research in the field of biotechnology is creating, and will continue to create, new claims of property interests in biological materials. As a result of that technological progress, biological materials that even twenty years ago would never have been thought to have economic worth have—as the facts of this case amply show—become extremely valuable. Without direction from this Court as to the proper limits on state authority to extinguish interests in property that are otherwise based on reasonable expectations grounded in state law and tradition, citizens will be vulnerable to exploitation at the hands of the state. Furthermore, a significant risk exists that the law will develop in a patchwork fashion, creating geographical barriers that will be highly detrimental to the progress of biotechnology, and to interstate commerce generally, as

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[22] Leading constitutional commentators have recognized the need for clarification in this area:

> [G]overnment must be denied the power to give binding force to so sweeping an announcement, whether explicit or implicit, if we are to give content to the just compensation clause as a real constraint on federal power and, through the fourteenth amendment, on state and local power. But this shows that the expectations protected by the clause must have their source outside positive law. Grounded in custom or necessity, these expectations achieve protected status not because the state has deigned to accord them protection, but because constitutional norms entitled them to protection.

L. Tribe, American Constitutional Law 608 (2d ed. 1988); *see also*, Thompson, Judicial Takings, 76 Va. L. Rev. 1449, 1523-44 (1990).

individual States reach conflicting judgments whether bodily materials constitute property.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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90-1037

No. 90-____

Supreme Court, U.S.
FILED
DEC 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOHN MOORE,

Petitioner,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, DAVID W. GOLDE, M.D., SHIRLEY G. QUAN,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of California

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

S006987

JOHN MOORE,
Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,
Defendants and Respondents.

[Filed Jul. 9, 1990]

I. INTRODUCTION

We granted review in this case to determine whether plaintiff has stated a cause of action against his physician and other defendants for using his cells in potentially lucrative medical research without his permission. Plaintiff alleges that his physician failed to disclose preexisting research and economic interests in the cells before obtaining consent to the medical procedures by which they were extracted. The superior court sustained all defendants' demurrers to the third amended complaint, and the Court of Appeal reversed. We hold that the complaint states a cause of action for breach of the physician's disclosure obligations, but not for conversion.

II. FACTS

Our only task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action. Accordingly, we assume that the complaint's

properly pleaded material allegations are true and give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context. (*Phillips* v. *Desert Hospital Dist.* (1989) 49 Cal.3d 699, 702; *Blank* v. *Kirwan* (1985) 39 Cal.3d 311, 318; *Tameny* v. *Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170.) We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law. (*Daar* v. *Yellow Cab Co.* (1967) 67 Cal.2d 695, 713.) For these purposes we briefly summarize the pertinent factual allegations of the 50-page complaint.

The plaintiff is John Moore (Moore), who underwent treatment for hairy-cell leukemia at the Medical Center of the University of California at Los Angeles (UCLA Medical Center). The five defendants are: (1) Dr. David W. Golde (Golde), a physician who attended Moore at UCLA Medical Center; (2) the Regents of the University of California (Regents), who own and operate the university; (3) Shirley W. Quan, a researcher employed by the Regents; (4) Genetics Institute, Inc. (Genetics Institute); and (5) Sandoz Pharmaceuticals Corporation and related entities (collectively Sandoz).

Moore first visited UCLA Medical Center on October 5, 1976, shortly after he learned that he had hairy-cell leukemia. After hospitalizing Moore and "withdr[awing] extensive amounts of blood, bone marrow aspirate, and other bodily substances," Golde [1] confirmed that diagnosis.

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[1] The complaint often uses the plural "defendants" instead of referring to particular defendants. This practice sometimes results in obvious errors, such as the allegation that "*defendants* saw and examined [Moore] on or about October 5, 1976 and then hospitalized [him] . . . ." (Emphasis added.) Genetics Institute and Sandoz, for example, are not physicians, and the complaint specifically alleges that neither entity became involved until years later.

To avoid absurdity in summarizing the complaint's allegations we have relied on the context in attempting to discern which defendants Moore actually means. (See, e.g., *Blank* v. *Kirwan*, supra, 39 Cal.3d at p. 318 ["we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context"].)

At this time all defendants, including Golde, were aware that "certain blood products and blood components were of great value in a number of commercial and scientific efforts" and that access to a patient whose blood contained these substances would provide "competitive, commercial, and scientific advantages."

On October 8, 1976, Golde recommended that Moore's spleen be removed. Golde informed Moore "that he had reason to fear for his life, and that the proposed splenectomy operation . . . was necessary to slow down the progress of his disease." Based upon Golde's representations, Moore signed a written consent form authorizing the splenectomy.

Before the operation, Golde and Quan "formed the intent and made arrangements to obtain portions of [Moore's] spleen following its removal" and to take them to a separate research unit. Golde gave written instructions to this effect on October 18 and 19, 1976. These research activities "were not intended to have . . . any relation to [Moore's] medical . . . care." However, neither Golde nor Quan informed Moore of their plans to conduct this research or requested his permission. Surgeons at UCLA Medical Center, whom the complaint does not name as defendants, removed Moore's spleen on October 20, 1976.

Moore returned to the UCLA Medical Center several times between November 1976 and September 1983. He did so at Golde's direction and based upon representations "that such visits were necessary and required for his health and well-being, and based upon the trust inherent in and by virtue of the physician-patient relationship . . . ." On each of these visits Golde withdrew additional samples of "blood, blood serum, skin, bone marrow aspirate, and sperm." On each occasion Moore travelled to the UCLA Medical Center from his home in Seattle because he had been told that the procedures were to be performed only there and only under Golde's direction.

"In fact, [however,] throughout the period of time that [Moore] was under [Golde's] care and treatment, . . . the defendants were actively involved in a number of activities which they concealed from [Moore] . . . ." Specifically, defendants were conducting research on Moore's cells and planned to "benefit financially and competitively . . . [by exploiting the cells] and [their] exclusive access to [the cells] by virtue of [Golde's] on-going physician-patient relationship . . . ."

Sometime before August 1979, Golde established a cell line from Moore's T-lymphocytes.[2] On January 30, 1981,

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[2] A T-lymphocyte is a type of white blood cell. T-lymphocytes produce lymphokines, or proteins that regulate the immune system. Some lymphokines have potential therapeutic value. If the genetic material responsible for producing a particular lymphokine can be identified, it can sometimes be used to manufacture large quantities of the lymphokine through the techniques of recombinant DNA. (See generally U.S. Congress, Office of Technology Assessment, New Developments in Biotechnology: Ownership of Human Tissues and Cells, 1987), at pp. 31-46 (hereafter OTA Report); see also fn. 29, post.)

While the genetic code for lymphokines does not vary from individual to individual, it can nevertheless be quite difficult to locate the gene responsible for a particular lymphokine. Because T-lymphocytes produce many different lymphokines, the relevant gene is often like a needle in a haystack. (OTA Rep., p. 42.) Moore's T-lymphocytes were interesting to the defendants because they overproduced certain lymphokines, thus making the corresponding genetic material easier to identify. (In published research papers, defendants and other researchers have shown that the overproduction was caused by a virus, and that normal T-lymphocytes infected by the virus will also overproduce. See footnote 30, post.)

Cells taken directly from the body ("primary cells") are not very useful for these purposes. Primary cells typically reproduce a few times and then die. One can, however, sometimes continue to use cells for an extended period of time by developing them into a "cell line," a culture capable of reproducing indefinitely. This is not, however, always an easy task. "Long-term growth of human cells and tissues is difficult, often an art," and the probability of succeeding with any given cell sample is low, except for a few types of cells not involved in this case. (OTA Rep., supra, at p. 5.)

the Regents applied for a patent on the cell line, listing Golde and Quan as inventors. "[B]y virtue of an established policy . . . , [the] Regents, Golde, and Quan would share in any royalties or profits . . . arising out of [the] patent." The patent issued on March 20, 1984, naming Golde and Quan as the inventors of the cell-line and the Regents as the assignee of the patent. (U.S. Patent No. 4,438,032 (Mar. 20, 1984).)

The Regents' patent also covers various methods for using the cell-line to produce lymphokines.[3] Moore admits in his complaint that "the true clinical potential of each of the lymphokines . . . [is] difficult to predict, [but] . . . competing commercial firms in these relevant fields have published reports in biotechnology industry periodicals predicting a potential market of approximately $3.01 Billion Dollars by the year 1990 for a whole range of [such lymphokines] . . . ."

With the Regents' assistance, Golde negotiated agreements for commercial development of the cell line and products to be derived from it. Under an agreement with Genetics Institute, Golde "became a paid consultant" and "acquired the rights to 75,000 shares of common stock." Genetics Institute also agreed to pay Golde and the Regents "at least $330,000 over three years, including a pro-rata share of [Golde's] salary and fringe benefits, in exchange for . . . exclusive access to the materials and research performed" on the cell line and products derived from it. On June 4, 1982, Sandoz "was added to the agreement," and compensation payable to Golde and the Regents was increased by $110,000. "[T]hroughout this period, . . . Quan spent as much as 70 [percent] of her time working for [the] Regents on research" related to the cell line.

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[3] See footnote 2, ante.

Based upon these allegations, Moore attempted to state 13 causes of action.[4] Each defendant demurred to each purported cause of action. The superior court, however, expressly considered the validity of only the first cause of action, conversion.[5] Reasoning that the remaining causes of action incorporated the earlier, defective allegations, the superior court sustained a general demurrer to the entire complaint with leave to amend. In a subsequent proceeding, the superior court sustained Genetics Institute's and Sandoz's demurrers without leave to amend on the grounds that Moore had not stated a cause of action for conversion and that the complaint's allegations about the entities' secondary liability were too conclusory. In accordance with its earlier ruling that the defective allegations about conversion rendered the entire complaint insufficient, the superior court took the remaining demurrers off its calendar.

With one justice dissenting, the Court of Appeals reversed, holding that the complaint did state a cause of action for conversion. The Court of Appeal agreed with the superior court that the allegations against Genetics Institute and Sandoz were insufficient, but directed the superior court to give Moore leave to amend. The Court of Appeal also directed the superior court to decide "the

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[4] (1) "Conversion"; (2) "lack of informed consent"; (3) "breach of fiduciary duty"; (4) "fraud and deceit"; (5) "unjust enrichment"; (6) "quasi-contract"; (7) "bad faith breach of the implied covenant of good faith and fair dealing"; (8) "intentional infliction of emotional distress"; (9) "negligent misrepresentation"; (10) "intentional interference with prospective advantageous economic relationships"; (11) "slander of title"; (12) "accounting"; and (13) "declaratory relief."

[5] The superior court did not reach (a) any defendant's general demurrer to the causes of action numbered 2 through 13; (b) any defendant's demurrer on the ground of the statute of limitations; (c) Golde's, Quan's, and the Regents' demurrers on the grounds of governmental immunity; or (d) Genetics Institute's and Sandoz's numerous demurrers for uncertainty.

remaining causes of action, which [had] never been expressly ruled upon."

III. DISCUSSION

A. *Breach of Fiduciary Duty and Lack of Informed Consent*

Moore repeatedly alleges that Golde failed to disclose the extent of his research and economic interests in Moore's cells[6] before obtaining consent to the medical procedures by which the cells were extracted. These allegations, in our view, state a cause of action against Golde for invading a legally protected interest of his patient. This cause of action can properly be characterized either as the breach of a fiduciary duty to disclose facts material to the patient's consent or, alternatively, as the performance of medical procedures without first having obtained the patient's informed consent.

Our analysis begins with three well-established principles. First, "a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment." (*Cobbs* v. *Grant* (1972) 8 Cal.3d 229, 242; cf. *Schloendorff* v. *Society of New York Hospital* (1914) 211 N.Y. 125 [105 N.E. 92, 93].) Second, "the patient's consent to treatment, to be effective, must be an informed consent." (*Cobbs* v. *Grant*, supra, 8 Cal. 3d at p. 242.) Third, in soliciting the patient's consent, a physician has a fiduciary duty to disclose all information material to the patient's decision. (Id., at pp. 242, 246; see also *Stafford* v. *Schultz* (1954) 42 Cal.2d 767, 777; *Nelson* v. *Gaunt* (1981) 125 Cal.App.3d 623, 635; *Berkey* v. *Anderson* (1969) 1 Cal.App.3d 790, 805; *Bowman* v. *McPheeters* (1947) 77 Cal.App.2d 795, 800.)

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[6] In this opinion we use the inclusive term "cells" to describe all of the cells taken from Moore's body, including blood cells, bone marrow, spleen, etc.

These principles lead to the following conclusions: (1) a physician must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect the physician's professional judgment; and (2) a physician's failure to disclose such interests may give rise to a cause of action for performing medical procedures without informed consent or breach of fiduciary duty.

To be sure, questions about the validity of a patient's consent to a procedure typically arise when the patient alleges that the physician failed to disclose medical risks, as in malpractice cases, and not when the patient alleges that the physician had a personal interest, as in this case. The concept of informed consent, however, is broad enough to encompass the latter. "The scope of the physician's communication to the patient . . . must be measured by the patient's need, and that need is whatever information is material to the decision." (*Cobbs* v. *Grant*, supra, 8 Cal.3d at p. 245.)

Indeed, the law already recognizes that a reasonable patient would want to know whether a physician has an economic interest that might affect the physician's professional judgment. As the Court of Appeal has said, "[c]ertainly a sick patient deserves to be free of any reasonable suspicion that his doctor's judgment is influenced by a profit motive." (*Magan Medical Clinic* v. *Cal. State Bd. of Medical Examiners* (1967) 249 Cal. App.2d 124, 132.) The desire to protect patients from possible conflicts of interest has also motivated legislative enactments. Among these is Business and Professions Code section 654.2. Under that section, a physician may not charge a patient on behalf of, or refer a patient to, any organization in which the physician has a "significant beneficial interest, unless [the physician] first discloses in writing to the patient, that there is such an interest and advises the patient that the patient may choose any organization for the purposes of obtaining the

services ordered or requested by [the physician]." (Bus. & Prof. Code § 654.2, subd. (a). See also Bus. & Prof. Code, § 654.1 [referrals to clinical laboratories].) Similarly, under Health and Safety Code section 24173, a physician who plans to conduct a medical experiment on a patient must, among other things, inform the patient of "[t]he name of the sponsor or funding source, if any . . . and the organization, if any, under whose general aegis the experiment is being conducted."[7] (Health & Saf. Code, § 24173, subd. (c)(9).)

It is important to note that no law prohibits a physician from conducting research in the same area in which he practices. Progress in medicine often depends upon physicians, such as those practicing at the university hospital where Moore received treatment, who conduct research while caring for their patients.

Yet a physician who treats a patient in whom he also has a research interest has potentially conflicting loyalties. This is because medical treatment decisions are made on the basis of proportionality—weighing the benefits *to the patient* against the risks *to the patient*. As another court has said, "the determination as to whether the burdens of treatment are worth enduring for any individual patient depends upon the facts unique in each case," and "the patient's interests and desires are the key ingredients of the decision-making process." (*Barber* v. *Superior Court* (1983) 147 Cal.App.3d 1006, 1018-1019.) A physician who adds his own research interests to this balance may be tempted to order a scientifically useful procedure

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[7] Health and Safety Code section 24173 is part of the Protection of Human Subjects in Medical Experimentation Act. (See Health & Saf. Code, § 24170 et seq.) The act provides maximum damages of $1,000 for negligent violations, $5,000 for willful violations, and $10,000 for willful violations which "expose[ ] a subject to a known substantial risk of serious injury . . . ." (Health & Saf. Code, § 24176.) Because the lower courts did not reach the issue, we need not determine whether the alleged research on Moore's cells would amount to a violation.

or test that offers marginal, or no, benefits to the patient.[8] The possibility that an interest extraneous to the patient's health has affected the physician's judgment is something that a reasonable patient would want to know in deciding whether to consent to a proposed course of treatment. It is material to the patient's decision and, thus, a prerequisite to informed consent. (See *Cobbs* v. *Grant*, supra, 8 Cal.3d at p. 245.)

Golde argues that the scientific use of cells that have already been removed cannot possibly affect the patient's medical interests. The argument is correct in one instance but not in another. If a physician has no plans to conduct research on a patient's cells at the time he recommends the medical procedure by which they are taken, then the patient's medical interests have not been impaired. In that instance the argument is correct. On the other hand, a physician who does have a preexisting research interest might, consciously or unconsciously, take that into consideration in recommending the procedure. In that instance the argument is incorrect: the physician's extraneous motivation may affect his judgment and is, thus, material to the patient's consent.

We acknowledge that there is a competing consideration. To require disclosure of research and economic interests may corrupt the patient's own judgment by distracting him from the requirements of his health.[9] But

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[8] This is, in fact, precisely what Moore has alleged with respect to the postoperative withdrawals of blood and other substances.

[9] A related problem may arise with excessive disclosure of the risks of medical treatment. As we recognized in *Cobbs* v. *Grant*, supra, disclosure of risks in some cases can "so seriously upset the patient" as to affect the patient's ability to weigh "dispassionately . . . the risks of refusing to undergo the recommended treatment." (*Cobbs* v. *Grant*, supra, 8 Cal.3d at p. 246.) Under those circumstances, "[a] disclosure need not be made beyond that required within the medical community . . . ." (*Ibid.*)

However, we made that statement in the context of a physician-patient relationship unaffected by possible conflicts of interest. *Cobbs* v. *Grant*, supra, permits a physician acting solely in the

California law does not grant physicians unlimited discretion to decide what to disclose. Instead, "it is the prerogative of the patient, not the physician, to determine for himself the direction in which he believes his interests lie." (*Cobbs* v. *Grant*, supra, 8 Cal.3d at p. 242.) "Unlimited discretion in the physician is irreconcilable with the basic right of the patient to make the ultimate informed decision . . . ." (Id., at p. 243.)

Accordingly, we hold that a physician who is seeking a patient's consent for a medical procedure must, in order to satisfy his fiduciary duty [10] and to obtain the patient's informed consent, disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his medical judgment.

1. *Dr. Golde*

We turn now to the allegations of Moore's third amended complaint to determine whether he has stated such a cause of action. We first discuss the adequacy of

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patient's best interests to consider whether excessive disclosure will harm the patient. Disclosure of possible conflicts of interest raises different considerations. To illustrate, a physician who orders a procedure partly to further a research interest unrelated to the patient's health should not be able to avoid disclosure with the argument that the patient might object to participation in research. In some cases, however, a physician's research interest might play such an insignificant role in the decision to recommend a medically indicated procedure that disclosure should not be required because the interest is not material. By analogy, we have not required disclosure of "remote" risks (*Cobbs* v. *Grant*, *supra*, 8 Cal.3d at p. 245) that "are not central to the decision to administer or reject [a] procedure." (*Truman* v. *Thomas* (1980) 27 Cal.3d 285, 293.)

[10] In some respects the term "fiduciary" is too broad. In this context the term "fiduciary" signifies only that a physician must disclose all facts material to the patient's decision. A physician is not the patient's financial adviser. As we have already discussed, the reason why a physician must disclose possible conflicts is not because he has a duty to protect his patient's financial interests, but because certain personal interests may affect professional judgment.

Moore's allegations against Golde, based upon the physician's disclosures prior to the splenectomy.

Moore alleges that, prior to the surgical removal of his spleen, Golde "formed the intent and made arrangements to obtain portions of his spleen following its removal from [Moore] in connection with [his] desire to have regular and continuous access to, and possession of, [Moore's] unique and rare Blood and Bodily Substances." Moore was never informed prior to the splenectomy of Golde's "prior formed intent" to obtain a portion of his spleen. In our view, these allegations adequately show that Golde had an undisclosed research interest in Moore's cells at the time he sought Moore's consent to the splenectomy. Accordingly, Moore has stated a cause of action for breach of fiduciary duty, or lack of informed consent, based upon the disclosures accompanying that medical procedure.

We next discuss the adequacy of Golde's alleged disclosures regarding the postoperative takings of blood and other samples. In this context, Moore alleges that Golde "expressly, affirmatively and impliedly represented . . . that these withdrawals of his Blood and Bodily Substances were necessary and required for his health and well-being." However, Moore also alleges that Golde actively concealed his economic interest in Moore's cells during this time period. "[D]uring each of these visits . . . , and even when [Moore] inquired as to whether there was any possible or potential commercial or financial value or significance of his Blood and Bodily Substances, or whether the defendants had discovered anything . . . which was or might be . . . related to any scientific activity resulting in commercial or financial benefits . . . , the defendants repeatedly and affirmatively represented to [Moore] that there was no commercial or financial value to his Blood and Bodily Substances . . . and in fact actively discouraged such inquiries."

Moore admits in his complaint that defendants disclosed they "were engaged in strictly academic and purely scien-

tific medical research . . . ." However, Golde's representation that he had no financial interest in this research became false, based upon the allegations, at least by May 1979, when he "began to investigate and initiate the procedures . . . for [obtaining] a patent" on the cell line developed from Moore's cells.

In these allegations, Moore plainly asserts that Golde concealed an economic interest in the postoperative procedures. Therefore, applying the principles already discussed, the allegations state a cause of action for breach of fiduciary duty or lack of informed consent.

We thus disagree with the superior court's ruling that Moore had not stated a cause of action because essential allegations were lacking. We discuss each such allegation. First, in the superior court's view, Moore needed but failed to allege that defendants knew his cells had potential commercial value *on October 5, 1976* (the time blood tests were first performed at UCLA Medical Center) and had *at that time* already formed the intent to exploit the cells. We agree with the superior court that the absence of such allegations precludes Moore from stating a cause of action based upon the procedures undertaken on October 5, 1976. But, as already discussed, Moore clearly alleges that Golde had developed a research interest in his cells by October 20, 1976, when the splenectomy was performed. Thus, Moore can state a cause of action based upon Golde's alleged failure to disclose that interest before the splenectomy.

The superior court also held that the lack of essential allegations prevented Moore from stating a cause of action based on the splenectomy. According to the superior court, Moore failed to allege that the operation lacked a therapeutic purpose or that the procedure was totally unrelated to therapeutic purposes. In our view, however, neither allegation is essential. Even if the splenectomy

had a therapeutic purpose,[11] it does not follow that Golde had no duty to disclose his additional research and economic interests. As we have already discussed, the existence of a motivation for a medical procedure unrelated to the patient's health is a potential conflict of interest and a fact material to the patient's decision.

2. *The Remaining Defendants*

The Regents, Quan, Genetics Institute, and Sandoz are not physicians. In contrast to Golde, none of these defendants stood in a fiduciary relationship with Moore or had the duty to obtain Moore's informed consent to medical procedures. If any of these defendants is to be liable for breach of fiduciary duty or performing medical procedures without informed consent, it can only be on account of Golde's acts and on the basis of a recognized theory of secondary liability, such as respondeat superior. The procedural posture of this case, however, makes it unnecessary for us to address the sufficiency of Moore's secondary-liability allegations.

As already mentioned, the superior court addressed only the purported cause of action for conversion. Because the superior court found that Moore had not stated such a cause of action, it had no occasion to address the sufficiency of Moore's allegation that the Regents and Quan were acting as Golde's "agent[s]" and "joint venturer[s]."[12] In a later proceeding, however, the superior

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[11] The record shows that the splenectomy did have a therapeutic purpose. The Regents' patent application, which the superior court and the Court of Appeals both accepted as part of the record, shows that Moore had a grossly enlarged spleen and that its excision improved his condition.

[12] Moore's secondary-liability allegations are egregious examples of generic boilerplate: "each of the defendants was the agent, joint venturer and employee of each of the other remaining defendants, and is jointly liable for the acts of every other defendant and in doing the things hereinafter alleged, each was acting within the course and scope of said agency, employment, partnership and joint

court did find that the same allegations were too conclusory to state a cause of action against Genetics Institute and Sandoz.

The Court of Appeal did not hold, explicitly or implicitly, that Moore's secondary-liability allegations were sufficient as against any defendant. The court did hold that Moore had stated a cause of action against the Regents and Quan. However, the court did not reach that conclusion on the basis of secondary liability. Instead, drawing no distinctions between the defendants, the court held simply that each defendant was primarily liable for conversion.[13] Because no court has yet addressed the Regents' and Quan's secondary liability and because the superior court will need to consider other issues on remand, there is no need to address these issues at this time.[14]

With respect to Genetics Institute and Sandoz, the situation is slightly different. The Court of Appeal mentioned Moore's secondary-liability allegations against these defendants but expressed no opinion as to their sufficiency. Instead, as to these defendants the court merely reversed the superior court's order "for failure to grant leave to amend." Our affirmance of this part of the Court of Appeal's decision will leave Moore free to attempt, once

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venture with the advance knowledge, acquiescence or subsequent ratification of each and every remaining defendant, and that each defendant joined together with every other defendant . . . had a fiduciary duty to the plaintiff, and each acted in concert with every other defendant in violating their [sic] duties to plaintiff."

Nowhere in the third amended complaint does Moore specifically allege that any defendant other than Golde knew that Moore had not received adequate disclosures.

[13] As discussed below, we reject the conclusion that Moore can state a cause of action for conversion against any defendant.

[14] Thus, we express no opinion on whether Moore has stated, or can state, a cause of action against the Regents for Golde's alleged torts under the doctrine of respondant superior.

again, to allege that Genetics Institute and Sandoz are secondarily liable for Golde's torts.

B. *Conversion*

Moore also attempts to characterize the invasion of his rights as a conversion—a tort that protects against interference with possessory and ownership interests in personal property. He theorizes that he continued to own his cells following their removal from his body, at least for the purpose of directing their use, and that he never consented to their use in potentially lucrative medical research. Thus, to complete Moore's argument, defendants' unauthorized use of his cells constitutes a conversion. As a result of the alleged conversion, Moore claims a proprietary interest in each of the products that any of the defendants might ever create from his cells or the patented cell line.

No court, however, has ever in a reported decision imposed conversion liability for the use of human cells in medical research.[15] While that fact does not end our inquiry, it raises a flag of caution. In effect, what Moore is asking us to do is to impose a tort duty on scientists to investigate the consensual pedigree of each human cell sample used in research.[16] To impose such a duty, which would affect medical research of importance to all of

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[15] The absence of such authority cannot simply be attributed to recent developments in technology. The first human tumor cell line, which still is widely used in research, was isolated in 1951. (OTA Rep., supra, at p. 34.)

[16] Imposing liability for conversion is equivalent to the imposition of such a duty, since only through investigation would users of cells be able to avoid liability. "'A tort, whether intentional or negligent, involves a violation of a *legal duty*, imposed by statute, contract or otherwise, owed by the defendant to the person injured. Without such a duty, any injury is "damnum absque injuria"—injury without wrong. [Citations.]'" (*Nally* v. *Grace Community Church* (1988) 47 Cal.3d 278, 292, quoting 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 6, p. 61, italics in original.)

society, implicates policy concerns far removed from the traditional, two-party ownership disputes in which the law of conversion arose.[17] Invoking a tort theory originally used to determine whether the loser or the finder of a horse had the better title, Moore claims ownership of the results of socially important medical research, including the genetic code for chemicals that regulate the functions of every human being's immune system.[18]

We have recognized that, when the proposed application of a very general theory of liability in a new context raises important policy concerns, it is especially important to face those concerns and address them openly. (Cf. *Nally* v. *Grace Community Church*, supra, 47 Cal.3d 278, 291-300 [declining to expand negligence law to encompass theory of "clergyman malpractice"]; *Foley* v. *Interactive Data Corp.* (1988) 47 Cal.3d 654, 694-700 [declining to apply tort remedies for breach of the covenant of good faith in the employment context]; *Brown* v. *Superior Court* (1988) 44 Cal.3d 1049, 1061-1066 [declining to apply strict products liability to pharmaceutical manufacturers].) Moreover, we should be hesitant to "impose [new tort duties] when to do so would involve complex policy decisions" (*Nally* v. *Grace Community Church*,

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[17] Conversion arose out of the common law action of trover. "We probably do not have the earliest examples of its use, but they were almost certainly cases in which the finder of lost goods did not return them, but used them himself, or disposed of them to someone else. . . . By 1554 the allegations of the complaint had become more or less standardized: that the plaintiff was possessed of certain goods, that he casually lost them, that the defendant found them, and that the defendant did not return them, but instead 'converted them to his own use.' From that phrase in the pleading came the name of the tort." (Prosser & Keeton, Torts (5th ed. 1984) § 15, p. 89.)

[18] Moore alleges, for example, that "genetic sequences . . . are his tangible personal property . . . ." We are not, however, bound by that conclusion of law. (*Daar* v. *Yellow Cab Co.*, supra, 67 Cal.2d at p. 713.) Moreover, as already mentioned, the genetic code for lymphokines does not vary from individual to individual. (See fns. 2, ante, and 30, post.)

supra, 47 Cal.3d at p. 299), especially when such decisions are more appropriately the subject of legislative deliberation and resolution. (See *Foley* v. *Interactive Data Corp.*, supra, 47 Cal.3d at p. 694 & fn. 31.) This certainly is not to say that the applicability of common law torts is limited to the historical or factual contexts of existing cases. But on occasions when we have opened or sanctioned new areas of tort liability, we "have noted that the 'wrongs and injuries involved were both comprehensive and assessable within the existing judicial framework.' " (*Nally* v. *Grace Community Church*, supra, 47 Cal.3d at p. 298, quoting *Peter W.* v. *San Francisco Unified Sch. Dist.* (1976) 60 Cal.App. 3d 814, 824.)

Accordingly, we first consider whether the tort of conversion clearly gives Moore a cause of action under existing law. We do not believe it does. Because of the novelty of Moore's claim to own the biological materials at issue, to apply the theory of conversion in this context would frankly have to be recognized as an extension of the theory. Therefore, we consider next whether it is advisable to extend the tort to this context.

1. *Moore's Claim Under Existing Law*

"To establish a conversion, plaintiff must establish an actual interference with his *ownership* or *right of possession*. . . . Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion." [19] (*Del E. Webb Corp.* v. *Structural Materials Co.* (1981) 123 Cal.

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[19] While it ordinarily suffices to allege ownership generally (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 654, p. 103), it is well established that a complaint's contentions or conclusions of law do not bind us. (*Daar* v. *Yellow Cab Co.*, supra, 67 Cal.2d at p. 713.) Moore's novel allegation that he "owns" the biological materials involved in this case is both a contention and a conclusion of law.

App. 3d 593, 610-611, emphasis added. See also *General Motors A. Corp.* v. *Dallas* (1926) 198 Cal. 365, 370.)

Since Moore clearly did not expect to retain possession of his cells following their removal,[20] to sue for their conversion he must have retained an ownership interest in them. But there are several reasons to doubt that he did retain any such interest. First, no reported judicial decision supports Moore's claim, either directly or by close analogy. Second, California statutory law drastically limits any continuing interest of a patient in excised cells. Third, the subject matters of the Regents' patent—the patented cell line and the products derived from it—cannot be Moore's property.

Neither the Court of Appeal's opinion, the parties' briefs, nor our research discloses a case holding that a person retains a sufficient interest in excised cells to support a cause of action for conversion. We do not find this surprising, since the laws governing such things as human tissues,[21] transplantable organs,[22] blood,[23]

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[20] In his complaint, Moore does not seek possession of his cells or claim the right to possess them. This is consistent with Health and Safety Code section 7054.4, which provides that "human tissues . . . following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety."

[21] See Health and Safety Code section 7054.4 (fn. 20, ante).

[22] See the Uniform Anatomical Gift Act, Health and Safety Code section 7150 et seq. The act permits a competent adult to "give all or part of [his] body" for certain designated purposes, including "transplantation, therapy, medical or dental education, research, or advancement of medical or dental science." (Health & Saf. Code, §§ 7151, 7153.) The act does not, however, permit the donor to receive "valuable consideration" for the transfer. (Health & Saf. Code § 7155.)

[23] See Health & Safety Code section 1601 et seq., which regulates the procurement, processing, and distribution of human blood. Health and Safety Code section 1606 declares that "[t]he procure-

fetuses,[24] pituitary glands,[25] corneal tissue,[26] and dead bodies [27] deal with human biological materials as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property. It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.

Lacking direct authority for importing the law of conversion into this context, Moore relies, as did the Court of Appeal, primarily on decisions addressing privacy

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ment, processing, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing the same . . . is declared to be, for all purposes whatsoever, the rendition of a service . . . and shall not be construed to be, and is declared not to be, a sale . . . for any purpose or purposes whatsoever."

[24] See Health and Safety Code section 7054.3: "Notwithstanding any other provision of law, a recognizable dead human fetus of less than 20 weeks uterogestation not disposed of by interment shall be disposed of by incineration."

[25] See Government Code section 27491.46: "The coroner [following an autopsy] shall have the right to retain pituitary glands solely for transmission to a university, for use in research or the advancement of medical science" (id., subd. (a)) or "for use in manufacturing a hormone necessary for the physical growth of persons who are, or may become, hypopituitary dwarfs . . ." (id., subd. (b)).

[26] See Government Code section 27491.47: "The coroner may, in the course of an autopsy [and subject to specified conditions], remove . . . corneal eye tissue from a body . . ." (id., subd. (a)) for "transplant, therapeutic, or scientific purposes" (id., subd. (a)(5)).

[27] See Health and Safety Code section 7000 et seq. While the code does not purport to grant property rights in dead bodies, it does give the surviving spouse, or other relatives, "[t]he right to control the disposition of the remains of a deceased person, unless other directions have been given by the decedent . . ." (Health & Saf. Code, § 7100.)

rights.[28] One line of cases involves unwanted publicity. (*Lugosi* v. *Universal Pictures* (1979) 25 Cal.3d 813; *Motschenbacher* v. *R.J. Reynolds Tobacco Company* (9th Cir. 1974) 498 F.2d 821 [interpreting Cal. law].) These opinions hold that every person has a proprietary interest in his own likeness and that unauthorized, business use of a likeness is redressible as a tort. But in neither opinion did the authoring court expressly base its holding on property law. (*Lugosi* v. *Universal Pictures*, supra, 25 Cal.3d at pp. 819, 823-826; *Motschenbacher* v. *R.J. Reynolds Tobacco Company*, supra, 498 F.2d at pp. 825-826.) Each court stated, following Prosser, that it was "pointless" to debate the proper characterization of the proprietary interest in a likeness. (*Motschenbacher* v. *R.J. Reynolds Tobacco Company*, supra, 498 F.2d at p. 825, quoting Prosser, Law of Torts (4th ed. 1987) at p. 807; *Lugosi* v. *Universal Pictures*, supra, 25 Cal.3d at pp. 819, 824.) For purposes of determining whether the tort of

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[28] No party has cited a decision supporting Moore's argument that excised cells are "a species of tangible personal property capable of being converted." On this point the Court of Appeal cited only *Venner* v. *State* (Md. Ct. Spec. App. 1976) 354 A.2d 483 (hereafter *Venner*), which dealt with the seizure of a criminal defendant's feces from a hospital bedpan by police officers searching for narcotics. The court held that the defendant had abandoned his excrement for purposes of the Fourth Amendment. (354 A.2d at pp. 498-499.)

In dictum, the *Venner* court observed that "[i]t is not unknown for a person to assert a continuing right of ownership, dominion, or control, for good reason or for no reason, over such things as excrement, fluid waste, secretions, hair, fingernails, toenails, blood, and organs or other parts of the body . . . ." (354 A.2d at p. 498.) This slender reed, alone, supported the Court of Appeal's conclusion in the case before us that "it cannot be said that a person has no property right in materials which were once part of his body." However, because *Venner* involved a criminal-procedure dispute over the suppression of evidence, and not a civil dispute over who was entitled to the economic benefit of property, the opinion is grounded in markedly different policies and has little relevance to the case before us.

conversion lies, however, the characterization of the right in question is far from pointless. Only property can be converted.

Not only are the wrongful-publicity cases irrelevant to the issue of conversion, but the analogy to them seriously misconceives the nature of the genetic materials and research involved in this case. Moore, adopting the analogy originally advanced by the Court of Appeal, argues that "[i]f the courts have found a sufficient proprietary interest in one's persona, how could one not have a right in one's own genetic material, something far more profoundly the essence of one's human uniqueness than a name or a face?" However, as the defendants' patent makes clear—and the complaint, too, if read with an understanding of the scientific terms which it has borrowed from the patent—the goal and result of defendants' efforts has been to manufacture lymphokines.[29] Lympho-

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[29] Inside the cell, a gene produces a lymphokine (see fn. 2, ante) by attracting protein molecules, which bond to form a strand of "messenger RNA" (mRNA) in the mirror image of the gene. The mRNA strand then detaches from the gene and attracts other protein molecules, which bond to form the lymphokine that the original gene encoded. (OTA Rep., pp. 38-44.)

In the laboratory, scientists sometimes use genes to manufacture lymphokines by cutting a gene from the chromosome and grafting it onto the chromosome of a bacterium. The resulting chromosome is an example of "recombinant DNA," or DNA composed of genetic material from more than one individual or species. As the bacterium lives and reproduces, the engrafted gene continues to produce the lymphokine that the gene encodes. (OTA Rep., pp. 41-44, 158.)

It can be extremely difficult to identify the gene that carries the code for a particular lymphokine. "Since the amount of DNA in a human cell is enormous compared to the amount present in an individual gene, the search for any single gene within a cell is like searching for needle in a haystack." (OTA Rep., p. 42.) As the Regents' patent application explains, the significance of a cell that overproduces mRNA is to make the difficult search for a particular gene unnecessary. (U.S. Patent No. 4,438,032 (Mar. 20, 1984), at col. 2.) If one has an adequate source of mRNA—the gene's mirror image—it can be used to make a copy, or clone, of the

kines, unlike a name or a face, have the same molecular structure in every human being and the same, important functions in every human being's immune system. Moreover, the particular genetic material which is responsible for the natural production of lymphokines, and which defendants use to manufacture lymphokines in the laboratory, is also the same in every person; it is no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin.[30]

Another privacy case offered by analogy to support Moore's claim establishes only that patients have a right to refuse medical treatment. (*Bouvia* v. *Superior Court* (1986) 179 Cal.App.3d 1127.) In this context the court in *Bouvia* wrote that "'[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . .'" (Id., at p. 1139, quoting from *Schloendorff* v. *Society of New York Hospital*,

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original gene. The cloned gene can then be used in recombinant DNA, as already described, for large-scale production of lymphokines. (Id., at col. 3.)

[30] By definition, a gene responsible for producing a protein found in more than one individual will be the same in each. It is precisely because everyone needs the same basic proteins that proteins produced by one person's cells may have therapeutic values for another person. (See generally OTA Rep., at pp. 38-40.) Thus, the proteins that defendants hope to manufacture—lymphokines such as interferon—are in no way a "likeness" of Moore.

Because all normal persons possess the genes responsible for production of lymphokines, it is sometimes possible to make normal cells into overproducers. (See OTA Rep., at p. 55.) According to a research paper to which defendants contributed, Moore's cells overproduced lymphokines because they were infected by a virus, HTLV-II (human T-cell leukemia virus type II). (Chen, Quan, & Golde, *Human T-cell Leukemia virus type II transforms normal human lymphocytes* (Nov. 1983) 80 Proceedings Nat. Acad. Sci. USA, 7006, 7006.) The same virus has been shown to transform normal T-lymphocytes into overproducers like Moore's. (Ibid.)

supra, 211 N.Y. 125 [105 N.E. at p. 93].)[31] Relying on this language to support the proposition that a patient has a continuing right to control the use of excised cells, the Court of Appeal in this case concluded that "[a] patient must have the ultimate power to control what becomes of his or her tissues. To hold otherwise would open the door to a massive invasion of human privacy and dignity in the name of medical progress." Yet one may earnestly wish to protect privacy and dignity without accepting the extremely problematic conclusion that interference with those interests amounts to a conversion of personal property. Nor is it necessary to force the round pegs of "privacy" and "dignity" into the square hole of "property" in order to protect the patient, since the fiduciary-duty and informed-consent theories protect these interests directly by requiring full disclosure.

The next consideration that makes Moore's claim of ownership problematic is California's statutory law, which drastically limits a patient's control over excised cells. Pursuant to Health and Safety Code section 1054.4, "[n]otwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety."[32] Clearly the Legislature did not specifically in-

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[31] *Schloendorff* v. *Society of New York Hospital*, supra, is often cited as the first opinion recognizing the concept of informed consent.

[32] Although section 7054.4 occurs in a chapter of the Health & Safety Code entitled "Dead Bodies," only the term "human remains" refers solely to cadavers. This is because section 7001 so defines it. (Health & Saf. Code, § 7001.) The additional terms "recognizable anatomical parts" and "human tissues" are not expressly defined and must be given their ordinary meanings, which are not limited to dead bodies. Surgically removed organs, such as a spleen, are both "recognizable anatomical parts" and "human

tend this statute to resolve the question of whether a patient is entitled to compensation for the nonconsensual use of excised cells. A primary object of the statute is to ensure the safe handling of potentially hazardous biological waste materials.[33] Yet one cannot escape the conclusion that the statute's practical effect is to limit, drastically, a patient's control over excised cells. By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to "property" or "ownership" for purposes of conversion law.

It may be that some limited right to control the use of excised cells does survive the operation of this statute. There is, for example, no need to read the statute to per-

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tissues." Virus-infected cells, such as Moore's T-lymphocytes, fit reasonably within the statute's definition of "infectious waste." (See fn. 33, post.) The broad terms used in section 7054.4, a relatively recent addition to the 1939 chapter on dead bodies (added by Stats. 1971, ch. 377, § 2, p. 744, and amended by Stats. 1972, ch. 883, § 4, p. 1562), reflect legislative consideration of modern needs to provide for the disposal of materials in addition to dead bodies, including used hypodermic needles and other "infectious waste" materials generated in hospitals.

[33] The policy of keeping biological materials in safe hands has substantial relevance to this case. The catalog of the American Type Culture Collection, an organization that distributes cell lines to researchers, gives this warning about the cell line derived from Moore's T-lymphocytes: Because "[t]he cells . . . contain a replication competent genome of Human T Cell Leukemia Virus II (HTLV-II) [i.e., genetic material capable of reproducing the virus] . . . , they must be handled as potentially biohazardous material under P-II [level II] containment." (American Type Culture Collection, *Catalogue of Cell Lines and Hybridomas* (6th ed. 1988) p. 176.) Level II containment is a standard established by the National Institutes of Health and the Center for Disease Control for handling hazardous biological materials. The level II standard requires, among other things, the use of biological safety cabinet when the cell line is manipulated, and the autoclaving (sterilization by heat) and disposal of contaminated materials. (Id., p. xi.)

mit "scientific use" contrary to the patient's expressed wish.[34] A fully-informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve. That right, however, as already discussed, is protected by the fiduciary-duty and informed-consent theories.

Finally, the subject matter of the Regents' patent—the patented cell line and the products derived from it—cannot be Moore's property. This is because the patented cell line is both factually and legally distinct from the cells taken from Moore's body.[35] Federal law permits the

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[34] The dissent argues that the term "scientific use" in Health and Safety Code section 7054.4 excludes "commercial explcitation"; in effect, according to the dissent, the statute says "scientific use" but means "not-for-profit scientific use." (Dis. opn. of Mosk, J., post, at pp. ——-—— [typed dis. opn. at pp. 7-9].) There is, however, no reason to believe that the Legislature intended to make such a distinction. Nor is the distinction likely to be meaningful or practical in this context—"a relationship of unparalled intimacy between universities and biotechnology companies . . . ." (Dis. opn. of Mosk, J., post, at p. ——, fn. 15 [typed dis. opn., at p. 23, fn. 15].) Unless research necessarily ceases to be "scientific" when directed to the development of marketable products, a proposition we cannot accept, the distinction between academic and commercial "use" of human tissues has no logical bearing on the statute, which permits *all* "scientific use." Shedding no light on the Legislature's intent, philosophical issues about "scientists bec[oming] entrepreneurs" (dis. opn. of Mosk, J., post, at p. —— [typed dis. opn. at p. 23]) are best debated in another forum.

[35] The distinction between primary cells (cells taken directly from the body) and patented cell lines is not purely a legal one. Cells change while being developed into a cell line and continue to change over time. (OTA Rep., p. 34.) "[I]t is clear that most established cell lines . . . are not completely normal. Besides [an] enhanced growth potential relative to primary cells, they frequently have highly abnormal chromosome numbers . . . ." (2 Watson, Hopkins, Roberts, Steitz & Weiner, *Molecular Biology of the Gene* (4th ed. 1987) p. 967; see also OTA Rep., p. 36.)

The cell line in this case, for example, after many replications began to generate defective and rearranged forms of the HTLV-II

patenting of organisms that represent the product of "human ingenuity," but not naturally occurring organisms. (*Diamond* v. *Chakrabarty*, supra, 447 U.S. 303, 309-310.)[36] Human cell lines are patentable because "[l]ong-term adaptation and growth of human tissues and cells in culture is difficult—often considered an art . . . ," and the probability of success is low. (OTA Rep., supra, at p. 33; see fn. 2, ante.) It is this *inventive effort* that patent law rewards, not the discovery of naturally occurring raw materials. Thus, Moore's allegations that he owns the cell line and the products derived from it are inconsistent with the patent, which constitutes an authoritative determination that the cell line is the product of invention.[37] Since such allegations are nothing more than

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virus. A published research paper to which defendants contributed suggests that "the defective forms of virus were probably generated during the passage [or replication] of the cells rather than being present in the original tumor cells of the patient." Possibly because of these changes in the virus, the cell line has developed new abilities to grow in different media. (Chen, McLaughlin, Gasson, Clark & Golde, *Molecular characterization of genome of a novel human T-cell leukemia virus*, Nature (Oct. 6, 1983) vol. 305, no. 5934, p. 505.)

We find it interesting that Justice Mosk, in his dissent, would object to our "summar[y] of the salient conclusions" (*People* v. *Guerra* (1984) 37 Cal.3d 385, 412 [opn. by Mosk, J.]) of relevant scientific literature in setting forth the technological background of this case. (Dis. opn. of Mosk, J., post, at p. —— [typed dis. opn., at p. 46].) This court has previously cited scientific literature to show, for example, that reports of hypnotic recall "form[ed] a scientifically inadequate basis for drawing conclusions about the memory processes of the large majority of the population" (*People* v. *Shirley* (1982) 31 Cal.3d 18, 56 [opn. by Mosk, J.]), and that eyewitness testimony can be unreliable (*People* v. *McDonald* (1984) 37 Cal.3d 351, 365-367 [opn. by Mosk, J.]).

[36] In *Diamond* v. *Chakrabarty*, supra, the United States Supreme Court held that a genetically engineered bacterium was patentable as a "new and useful . . . manufacture, or composition of matter" under 35 United States Code section 101. (447 U.S. at pp. 308-310.)

[37] To avoid this conclusion, the dissent endorses a proposal to expand Congress' definition of "joint inventor" (35 U.S.C. § 116)

arguments or conclusions of law, they of course do not bind us. *Daar* v. *Yellow Cab Co.*, supra, 67 Cal.2d at p. 713.)

2. *Should Conversion Liability Be Extended?*

As we have discussed, Moore's novel claim to own the biological materials at issue in this case is problematic, at best. Accordingly, his attempt to apply the theory of conversion within this context must frankly be recognized as a request to extend that theory. While we do not purport to hold that excised cells can never be property for any purpose whatsoever, the novelty of Moore's claim demands express consideration of the policies to be served by extending liability (cf. *Nally* v. *Grace Community Church*, *supra*, 47 Cal.3d at pp. 291-300; *Foley* v. *Interactive Data Corp.*, *supra*, 47 Cal.3d at pp. 694-700; *Brown* v. *Superior Court*, *supra*, 44 Cal.3d at pp. 1061-1066) rather than blind deference to a complaint alleging as a legal conclusion the existence of a cause of action.

There are three reasons why it is inappropriate to impose liability for conversion based upon the allegations of Moore's complaint. First, a fair balancing of the relevant policy considerations counsels against extending the tort. Second, problems in this area are better suited to legislative resolution. Third, the tort of conversion is not necessary to protect patients' rights. For these reasons, we conclude that the use of excised human cells in medical research does not amount to a conversion.

Of the relevant policy considerations, two are of overriding importance. The first is protection of a competent

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to include the human source of biological materials used in research. (Dis. opn. of Mosk, J., post. at pp. ——-—— [typed dis. opn. at pp. 15-17].) Because exclusive power to effect change in the law of patents lies with Congress and the federal courts (U.S. Const., art. I, § 8, cl. 8; 28 U.S.C. §§ 1295, 1338), the dissent's criticism of the law's present state has no legitimate bearing on our disposition of this case.

patient's right to make autonomous medical decisions. That right, as already discussed, is grounded in well-recognized and long-standing principles of fiduciary duty and informed consent. (See, e.g., *Cobbs* v. *Grant*, supra, 8 Cal.3d at pp. 242-246; *Bowman* v. *McPheeters*, supra, 77 Cal.App.2d at p. 800.) This policy weighs in favor of providing a remedy to patients when physicians act with undisclosed motives that may affect their professional judgment. The second important policy consideration is that we not threaten with disabling civil liability innocent parties who are engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor's wishes.

To reach an appropriate balance of these policy considerations is extremely important. In its report to Congress (see fn. 2, ante), the Office of Technology Assessment emphasized that "[u]ncertainty about how courts will resolve disputes between specimen sources and specimen users could be detrimental to both academic researchers and the infant biotechnology industry, particularly when the rights are asserted long after the specimen was obtained. The assertion of rights by sources would affect not only the researcher who obtained the original specimen, but perhaps other researchers as well.

"Biological materials are routinely distributed to other researchers for experimental purposes, and scientists who obtain cell lines or other specimen-derived products, such as gene clones, from the original researcher could also be sued under certain legal theories [such as conversion]. Furthermore, the uncertainty could affect product developments as well as research. Since inventions containing human tissues and cells may be patented and licensed for commercial use, companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists." (OTA Rep., p. 27.)

Indeed, so significant is the potential obstacle to research stemming from uncertainty about legal title to biological materials that the Office of Technology Assessment reached this striking conclusion: "[R]egardless of the merit of claims by the different interested parties, resolving the current uncertainty may be more important to the future biotechnology than resolving it in any particular way." (Ibid.)

We need not, however, make an arbitrary choice between liability and non-liability. Instead, an examination of the relevant policy considerations suggests an appropriate balance: Liability based upon existing disclosure obligations, rather than an unprecedented extension of the conversion theory, protects patients' rights of privacy and autonomy without unnecessarily hindering research.

To be sure, the threat of liability for conversion might help to enforce patients' rights indirectly. This is because physicians might be able to avoid liability by obtaining patients' consent, in the broadest possible terms, to any conceivable subsequent research use of excised cells. Unfortunately, to extend the conversion theory would utterly sacrifice the other goal of protecting innocent parties. Since conversion is a strict liability tort,[38] it would impose liability on all those into whose hands the cells come, whether or not the particular defendant participated in, or knew of, the inadequate disclosures that violated the patient's right to make an in-

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[38] " 'The foundation for the action for conversion rests neither in the knowledge nor the intent of the defendant. . . . [Instead,] "the tort consists in the breach of what may be called an absolute duty; the act itself . . . is unlawful and redressable as a tort." ' [Citation.]" (*Byer* v. *Canadian Bank of Commerce* (1937) 8 Cal.2d 297, 300, quoting *Poggi* v. *Scott* (1914) 167 Cal. 372, 375. See also *City of Los Angeles* v. *Superior Court* (1978) 85 Cal.App.3d 143, 149 ["[c]onversion is a species of strict liability in which questions of good faith, lack of knowledge and motive are ordinarily immaterial"].)

formed decision. In contrast to the conversion theory, the fiduciary-duty and informed-consent theories protect the patient directly, without punishing innocent parties or creating disincentives to the conduct of socially beneficial research.

Research on human cells plays a critical role in medical research. This is so because researchers are increasingly able to isolate naturally occurring, medically useful biological substances and to produce useful quantities of such substances through genetic engineering. These efforts are beginning to bear fruit. Products developed through biotechnology that have already been approved for marketing in this country include treatments and tests for leukemia, cancer, diabetes, dwarfism, hepatitis-B, kidney transplant rejection, emphysema, osteoporosis, ulcers, anemia, infertility, and gynecological tumors, to name but a few. (Note, *Source Compensation for Tissues and Cells Used in Biotechnical Research: Why a Source Shouldn't Share in the Profits* (1989) 64 Notre Dame L. Rev. 628 & fn. 1 (hereafter Note, Source Compensation); see also OTA Rep., supra, at pp. 58-59.)

The extension of conversion law into this area will hinder research by restricting access to the necessary raw materials. Thousands of human cell lines already exist in tissue repositories, such as the American Type Culture Collection and those operated by the National Institutes of Health and the American Cancer Society. These repositories respond to tens of thousands of requests for samples annually. Since the patent office requires the holders of patents on cell lines to make samples available to anyone, many patent holders place their cell lines in repositories to avoid the administrative burden of responding to requests. (OTA Rep., supra, at p. 53.) At present, human cell lines are routinely copied and distributed to other researchers for experimental purposes,

usually free of charge.[39] This exchange of scientific materials, which still is relatively free and efficient, will surely be compromised if each cell sample becomes the potential subject matter of a lawsuit. (OTA Rep., supra, at p. 52.) [40]

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[39] "Under the current system of tissue banks, many firms have access to the tissue so the probability of efficient use of those tissues increases. . . . Presently, researchers need only ask for tissue samples, and their requests are usually granted by their own research facility, other research facilities, or tissue banks." (Note, Source Compensation, supra, 64 Notre Dame L. Rev. at p. 635. See also OTA Rep., supra, at p. 52.)

[40] As if to argue that liability for conversion could not make researchers' predicament any worse than it already is, the dissent asserts that the exchange of cell lines among researchers is increasingly restricted by contract. (Dis. opn. of Mosk, J., post, at p. —— [typed dis. opn., at p. 23].) However, as the Office of Technology Assessment explained in its report, this caution is *"a result of concerns over patent and ownership rights,"* including "[u]ncertainty about how courts will resolve disputes between specimen sources and specimen users . . . ." (OTA Rep., at pp. 27, 52, italics added.) Obviously, the extension of liability for conversion can only exacerbate the problem.

Moreover, the dissent's factual premise that biological materials no longer pass freely among researchers is greatly overstated. In the most important research contexts the distribution of biological materials is still essentially unrestricted. The Office of Technology Assessment found that "[i]nformal transfers are common among researchers and universities around the country." (OTA Rep., p. 52.) In addition, tissue repositories provide cell lines and tissue samples to any qualified researchers, either without cost or for a nominal fee. (OTA Rep., p. 53.) The availability of patent protection for cell lines actually *increases* the availability of research materials, since the Patent Office requires patent holders to make patented microorganisms available to researchers immediately after a patent issues. (See generally *In re Lundak* (Fed. Cir. 1985) 773 F.2d 1216, 1220-1222.) Generally available cell lines are of substantial importance not just to academic research, but to commercial research as well. Indeed, some biotechnology companies "do not use any original human tissue in research, concentrating their efforts on established cell lines instead. These companies obtain and manipulate generally available cell lines, resulting in new, unique, or improved cell lines." (OTA Rep., p. 55.)

To expand liability by extending conversion law into this area would have a broad impact. The House Committee on Science and Technology of the United States Congress found that "49 percent of the researchers at medical institutions surveyed used human tissues or cells in their research." Many receive grants from the National Institute of Health for this work. (OTA Rep., supra, at p. 52.) In addition, "there are nearly 350 commercial biotechnology firms in the United States actively engaged in biotechnology research and commercial product development and approximately 25 to 30 percent appear to be engaged in research to develop a human therapeutic or diagnostic reagent. . . . Most, but not all, of the human therapeutic products are derived from human tissues and cells, or human cell lines or cloned genes." (Id., at p. 56.)

In deciding whether to create new tort duties we have in the past considered the impact that expanded liability would have on activities that are important to society, such as research. For example, in *Brown* v. *Superior Court*, supra, 44 Cal.3d 1049, the fear that strict product liability would frustrate pharmaceutical research led us to hold that a drug manufacturer's liability should not be measured by those standards. We wrote that, "[i]f drug manufacturers were subject to strict liability, they might be reluctant to undertake research programs to develop some pharmaceuticals that would prove beneficial or to distribute others that are available to be marketed, because of the fear of large adverse monetary judgments." (Id., at p. 1063.)

As in *Brown*, the theory of liability that Moore urges us to endorse threatens to destroy the economic incentive to conduct important medical research. If the use of cells in research is a conversion, then with every cell sample a researcher purchases a ticket in a litigation lottery. Because liability for conversion is predicated on a continuing ownership interest, "companies are unlikely to invest

heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists." (OTA Rep., p. 27.)[41] In our view, borrowing again from *Brown*, "[i]t is not unreasonable to conclude in these circumstances that the imposition of a harsher test for liability would not further the public interest in the development and availability of these important products." *Brown* v. *Superior Court*, supra, 44 Cal.3d at p. 1065.)[42]

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[41] In his concurring and dissenting opinion, Justice Broussard suggests that we could extend conversion liability without threatening research by requiring the plaintiff to allege, in addition to the elements of conversion, that fraud by the physician invalidated the plaintiff's consent. (Conc. and dis. opn. of Broussard, J., post, at pp. ——-—— [typed conc. and dis. opn., at pp. 16-19].) There is, however, no need to create a new cause of action. As we have already explained, the allegation that a physician concealed material facts supports a cause of action for breach of fiduciary duty under existing law.

Nor would it significantly ameliorate the threat to research to limit conversion liability to cases in which the patient's consent was invalid. One cannot know with certainty whether a consent is valid until a lawsuit has been filed and resolved. Moreover, since liability for conversion is based on a finding that the plaintiff has a continuing ownership interest, the threat of a lawsuit against anyone in the chain of title would place the ownership of research materials in doubt.

[42] In order to make conversion liability seem less of a threat to research, the dissent argues that researchers could avoid liability by using only cell lines accompanied by documentation of the source's consent. (Dis. opn. of Mosk, J., post, at p. —— [typed dis. opn., at pp. 25, 27].) But consent forms do not come with guarantees of validity. As medical malpractice litigation shows, challenges to the validity and sufficiency of consent are not uncommon. Moreover, it is sheer fantasy to hope that waivers might be obtained for the thousands of cell lines and tissue samples presently in cell repositories and, for that reason, already in wide use among researchers. The cell line derived from Moore's T-lymphocytes, for example, has been available since 1984 to any researcher from the American Type Culture Collection. (American Type Culture Collection, *Catalogue of Cell Lines and Hybridomas*, supra, p. 176.) Other cell lines have been in wide use since as early as 1951. (OTA Rep., supra, at p. 34.)

Indeed, this is a far more compelling case for limiting the expansion of tort liability than *Brown*. In *Brown*, eliminating strict liability made it more difficult for plaintiffs to recover actual damages for serious physical injuries resulting from their mothers' prenatal use of the drug diethylstilbestrol (DES). *Brown* v. *Superior Court*, supra, 44 Cal.3d at pp. 1054-1055.) In this case, by comparison, limiting the expansion of liability under a conversion theory will only make it more difficult for Moore to recover a highly theoretical windfall. Any injury to his right to make an informed decision remains actionable through the fiduciary-duty and informed-consent theories.

If the scientific users of human cells are to be held liable for failing to investigate the consensual pedigree of their raw materials, we believe the Legislature should make that decision. Complex policy choices affecting all society are involved, and "[l]egislatures, in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties present evidence and express their views . . . ." (*Foley* v. *Interactive Data Corp.*, supra, 47 Cal.3d at p. 694, fn. 31.) Legislative competence to act in this area is demonstrated by the existing statutes governing the use and disposition of human biological materials.[43] Legislative interest is demonstrated by the extensive study recently commissioned by the United States Congress. (OTA Rep. supra.) Commentators are also recommending legislative solutions. See Danforth, *Cells, Sales, and Royalties: The Patient's Right to a Portion of the Profits* (1988) 6 Yale L. & Policy Rev. 179, 198-201; Note, Source Compensation, supra, 64 Notre Dame L. Rev. at pp. 643-645.)

Finally, there is no pressing need to impose a judicially created rule of strict liability since enforcement of physician's disclosure obligations will protect patients against

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[43] See footnotes 21 through 27, ante.

the very type of harm with which Moore was threatened. So long as a physician discloses research and economic interests that may affect his judgment, the patient is protected from conflicts of interest. Aware of any conflicts, the patient can make an informed decision to consent to treatment, or to withhold consent and look elsewhere for medical assistance. As already discussed, enforcement of physicians' disclosure obligations protects patients directly, without hindering the socially useful activities of innocent researchers.

For these reasons, we hold that the allegations of Moore's third amended complaint state a cause of action for breach of fiduciary duty or lack of informed consent, but not conversion.[44]

IV. DISPOSITION

The decision of the Court of Appeal is affirmed in part and reversed in part. The case is remanded to the Court of Appeal, which shall direct the superior court to: (1) overrule Golde's demurrers to the causes of action for breach of fiduciary duty and lack of informed consent;

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[44] Our disposition of this case makes it unnecessary to decide Sandoz's contention that, even if Moore's cells were personal property, the Regents took them pursuant to their statutory power of eminent domain. Under Education Code section 92040, "[t]he Regents . . . may acquire by eminent domain any property necessary to carry out any of the powers or functions of the University of California." One of the university's functions is to be "the primary state-supported academic agency for research." (Ed. Code, § 66500.) We note that Sandoz did not present this argument to the lower courts.

Our disposition also makes it unnecessary to consider Golde's contention that federal patent law would preempt a holding that Moore has any property rights in the subject matter of the Regents' patent, including the cell line. Golde bases his argument on the well-established principle that state law may not "give protection of a kind that clashes with the objectives of the federal patent laws." (*Sears, Roebuck & Co.* v. *Stiffel Co.* (1964) 376 U.S. 225, 231; see also *Kewanee Oil Co.* v. *Bicron Corp.* (1974) 416 U.S. 470, 480.)

(2) sustain, with leave to amend, the demurrers of the Regents, Quan, Sandoz, and Genetics Institute to the purported causes of action for breach of fiduciary duty and lack of informed consent; (3) sustain, without leave to amend, all defendants' demurrers to the purported cause of action for conversion; and (4) hear and determine all defendants' remaining demurrers.

PANELLI, J.

WE CONCUR:

LUCAS, C.J.
EAGLESON, J.
KENNARD, J.

CONCURRING OPINION BY ARABIAN, J.

I join in the views cogently expounded by the majority. I write separately to give voice to a concern that I believe informs much of that opinion but finds little or no expression therein. I speak of the moral issue.

Plaintiff has asked us to recognize and enforce a right to sell one's own body tissue *for profit*. He entreats us to regard the human vessel—the single most venerated and protected subject in any civilized society—as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much.

My learned colleague, Justice Mosk, in an impressive if ultimately unpersuasive dissent, recognizes the moral dimension of the matter. "Our society," he writes, "acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona." (Dis. opn. of Mosk, J., ante, p. — [typed dis. opn. at p. 28].) He concludes, however, that morality militates in favor of recognizing plaintiff's claim for conversion of his body tissue. Why? Essentially, he answers, because of these defendants' moral shortcomings, duplicity and greed. Let them be compelled, he argues, to disgorge a portion of their ill-gotten gains to the uninformed individual whose body was invaded and exploited and without whom such profits would not have been possible.

I share Justice Mosk's sense of outrage, but I cannot follow its path. His eloquent paean to the human spirit illuminates the problem, not the solution. Does it uplift or degrade the "unique human persona" to treat human tissue as a fungible article of commerce? Would it advance or impede the human condition, spiritually or scientifically, by delivering the majestic force of the law behind plaintiff's claim? I do not know the answers to these troubling questions, nor am I willing—like Justice Mosk—to treat

them simply as issues of "tort" law, susceptible of *judicial* resolution.

It is true, that this court has not often been deterred from deciding difficult legal issues simply because they require a choice between competing social or economic policies. *Foley* v. *Interactive Data Corp.* (1988) 47 Cal. 3d 654, 719-723 (conc. and dis. opn. of Kaufman, J.).) The difference here, however, lies in the nature of the conflicting moral, philohophical and even religious values at stake, and in the profound implications of the position urged. The ramifications of recognizing and enforcing a property interest in body tissues are not known, but are greatly feared—the effect on human dignity of a marketplace in human body parts, the impact on research and development of competitive bidding for such materials, and the exposure of researchers to potentially limitless and uncharted tort liability. (See Danforth, *Cells, Sales & Royalties: The Patient's Right to a Portion of the Profits* (1988) 6 Yale L. & Pol'y Rev. 179, 195; Note, *Source Compensation for Tissues and Cells Used in Biotechnical Research: Why a Source Shouldn't Share in the Profits* (1989) 64 Notre Dame L. Rev. 628, 634.)

Whether, as plaintiff urges, his cells should be treated as property susceptible to conversion is not, in my view, ours to decide. The question implicates choices which not only reflect, but which ultimately define our essence. A mark of wisdom for us as expositors of the law is the recognition that we cannot cure every ill, mediate every dispute, resolve every conundrum. Sometimes, as Justice Brandeis said, "the most important thing we do, is not doing." [1]

Where then shall a complete resolution be found? Clearly the Legislature, as the majority opinion suggests, is the proper deliberative forum. Indeed, a legislative response creating a licensing scheme, which establishes a

[1] Bickel, The Least Dangerous Branch (1962) page 71.

fixed rate of profit sharing between researcher and subject, has already been suggested. (*Danforth, supra*, 6 Yale L. & Pol'y Rev. at pp. 198-201.) Such an arrangement would not only avoid the moral and philosophical objections to a free market operation in body tissue, but would also address stated concerns by eliminating the inherently coercive effect of a waiver system and by compensating donors regardless of temporal circumstances.

The majority view is not unmindful of the seeming injustice in a result that denies plaintiff a claim for conversion of his body tissue, yet permits defendants to retain the fruits thereof. As we have explained, the reason for our holding is essentially two fold: First, plaintiff in this matter is not without a remedy; he remains free to pursue defendants on a breach-of-fiduciary-duty theory, as well as, perhaps, other tort claims not before us. Second, a judicial pronouncement, while supple, is not without its limitations. Courts cannot and should not seek to fashion a remedy for every "heartache and the thousand natural shocks that flesh is heir to." [2] Sometimes, the discretion of forbearance *is* the better part of responsive valor. This is such an occasion.

ARABIAN, J.

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[2] Shakespeare, *Hamlet*, Act III, Scene 1.

CONCURRING AND DISSENTING OPINION BY BROUSSARD, J.

Given the novel scientific setting in which this case arises and the considerable interest this litigation has engendered within the medical research community and the public generally, it is easy to lose sight of the fact that the specific allegations on which the complaint in this case rests are quite unusual, setting this matter apart from the great majority of instances in which donated organs or cells provide the raw materials for the advancement of medical science and the development of new and beneficial medical products. Ordinarily, when a patient consents to the use of a body part for scientific purposes, the potential value of the excised organ or cell is discovered only through subsequent experimentation or research, often months or years after the removal of the organ. In this case, however, the complaint alleges that plaintiff's doctor recognized the peculiar research and commercial value of plaintiff's cells *before* their removal from plaintiff's body. Despite this knowledge, the doctor allegedly failed to disclose these facts or his interest in the cells to plaintiff, either before plaintiff's initial surgery or throughout the ensuing seven-year period during which the doctor continued to obtain additional cells from plaintiff's body in the course of periodic medical examinations.

The majority opinion, of course, is not oblivious to the significance of these unusual allegations. It relies on those allegations in concluding that the complaint states a cause of action for breach of fiduciary duty. I concur fully in that holding.

When it turns to the conversion cause of action, however, the majority opinion fails to maintain its focus on the specific allegations before us. Concerned that the imposition of liability for conversion will impede medical research by innocent scientists who use the resources of

existing cell repositories—a factual setting not presented here—the majority opinion rests its holding, that a conversion action cannot be maintained, largely on the proposition that a patient generally possesses no right in a body part that has already been removed from his body. Here, however, plaintiff has alleged that defendants interfered with his legal rights before his body part was removed. Although a patient may not retain any legal interest in a body part after its removal when he has properly consented to its removal and use for scientific purposes, it is clear under California law that before a body part is removed it is the patient, rather than his doctor or hospital, who possesses the right to determine the use to which the body part will be put after removal. If, as alleged in this case, plaintiff's doctor improperly interfered with plaintiff's right to control the use of a body part by wrongfully withholding material information from him before its removal, under traditional common law principles plaintiff may maintain a conversion action to recover the economic value of the rights to control the use of his body part. Accordingly, I dissent from the majority opinion insofar as it rejects plaintiff's conversion cause of action.

I

To begin with, I concur fully in the majority's conclusion that the facts alleged in the complaint state a cause of action for breach of fiduciary duty against Dr. Golde. As the majority persuasively explains, because a physician's research activities and related commercial ventures may potentially affect his or her professional judgment, a physician has an obligation to disclose such personal interests to his patient. In this case, the complaint clearly alleges that Dr. Golde failed to fulfill this duty.

With respect to the additional defendants—the Regents of the University of California (hereafter Regents), Shirley G. Quan, Genetics Institute, Inc. (hereafter Genetics Institute), and Sandoz Pharmaceuticals Corpora-

tion (hereafter Sandoz)—I cannot fully join in the majority's conclusion. Although I agree that the trial court erred in sustaining these defendants' demurrers to the breach of fiduciary duty cause of action without leave to amend, in my view the majority's ruling with respect to these defendants is more equivocal than is warranted. (See maj. pn., *ante*, pp. ——-—— [typed maj. opn. pp. 20-22].) As the majority recognizes, the breach of fiduciary duty alleged in the complaint encompasses post-operative conduct—for example, the periodic withdrawal of blood, blood serum, bone marrow aspirate and sperm samples from plaintiff, requiring plaintiff to travel from Seattle to the Medical Center of the University of California at Los Angeles (hereafter UCLA Medical Center) —which continued until September 1983. By that date, according to the complaint, all of the defendants, including Genetics Institute and Sandoz, were already involved in the commercial venture. Despite the "boilerplate" nature of some of the agency allegations in the complaint (see maj. opn., *ante*, p. ——, fn. 12 [typed maj. opn. p. 21, fn. 12]), the complaint's allegations, viewed in their entirety,[1] charge sufficient complicity on the part

[1] In addition to the very general agency allegations quoted by the majority, the complaint also alleges (1) that "Golde, both in his capacity as a physician and in his separate capacity as a researcher engaged in commercial activities, was an employee, officer and/or agent of . . . [t]he Regents," (2) that "at all times after on or about 1980, continuing through the present, . . . Golde, both in his capacity as a physician in the physician-patient relationship with plaintiff, and as a researcher and investor engaged in the commercial exploitation of the products extracted from plaintiff, was an employee, officer, investor, advisor, consultant and/or agent of . . . Genetics Institute [and] . . . Sandoz," and (3) that "[i]n these applicable capacities, . . . Golde acted with the knowledge and support of . . . [t]he Regents, . . . Genetics Institute, [and] Sandoz . . ., which knew or should have known of . . . the means by which . . . Golde had obtained access to, and continued to have access to, plaintiff's [b]lood and [b]odily [s]ubstances, and through their actions and compensation of . . . Golde, ratified or approved . . . Golde's activities in this regard."

of all defendants in the allegedly improper postoperative conduct to survive a demurrer. If, after discovery, it becomes clear that the additional defendants bear no responsibility for either the original or continuing breach of fiduciary duty, those defendants can, of course, move for summary judgment on this count. At the present pleading stage, however, it is premature to absolve any of the defendants of liability for breach of fiduciary duty.

I disagree, however, with the suggestion in the dissenting opinion that defendants will be able to avoid all liability under the breach-of-fiduciary-duty theory simply by showing that plaintiff would have proceeded with the surgical removal of his diseased spleen even if defendants had disclosed their research and commercial interest in his cells. (See dis. opn., *post*, pp. ——-—— [typed dis. opn. pp. 39-42].) In the first place, because the alleged breach of fiduciary duty encompasses the postoperative conduct of defendants as well as the presurgical failure to disclose, plaintiff will clearly be entitled to recover under a breach-of-fiduciary-duty theory by establishing that he would not have consented to some or all of the extensive postoperative medical procedures if he had been fully aware of defendants' research and economic interests and motivations. Second, and more generally, in this context —unlike in the traditional "informed consent" context of *Cobbs* v. *Grant* (1972) (8 Cal.3d 229)—a plaintiff should not be required to establish that he would not have proceeded with the medical treatment in question if his physician had made full disclosure, but only that the doctor's wrongful failure to disclose information proximately caused the plaintiff some type of compensable damage. The majority does not attempt to identify in advance of trial the various kinds of damage or injury for which plaintiff may properly recover in his breach-of-fiduciary-duty action, and that may be understandable. Nonetheless, it is worth noting that, in appropriate circumstances, punitive as well as compensatory damages would clearly

be recoverable in such an action. Accordingly, the dissent underestimates the potential efficacy of the breach-of-fiduciary-duty cause of action in dismissing the action as a "paper tiger." (Dis. opn., *post*, p. —— [typed dis. opn. p. 42].)

II

With respect to the conversion cause of action, I dissent from the majority's conclusion that the facts alleged in this case do not state a cause of action for conversion.

If this were a typical case in which a patient consented to the use of his removed organ for general research purposes and the patient's doctor had no prior knowledge of the scientific or commercial value of the patient's organ or cells, I would agree that the patient could not maintain a conversion action. In that common scenario, the patient has abandoned any interest in the removed organ and is not entitled to demand compensation if it should later be discovered that the organ or cells have some unanticipated value. I cannot agree, however, with the majority that a patient may *never* maintain a conversion action for the unauthorized use of his excised organ or cells, even against a party who knew of the value of the organ or cells before they were removed and breached a duty to disclose that value to the patient. Because plaintiff alleges that defendants wrongfully interfered with his right to determine, prior to the removal of his body parts, how those parts would be used after removal, I conclude that the complaint states a cause of action under traditional, common law conversion principles.

In analyzing the conversion issue, the majority properly begins with the established requirements of a common law conversion action, explaining that a plaintiff is required to demonstrate an actual interference with his "ownership or right of possession" in the property in question. (Maj. opn., *ante*, p. —— [typed maj. opn. p. 26].). Although the majority opinion, at several points, appears to suggest that a removed body part, by its nature, may

never constitute "property" for purposes of a conversion action (see maj. opn., *ante*, pp. ——, —— [typed maj. opn. pp. 29, 30, 34]), there is no reason to think that the majority opinion actually intends to embrace such a broad or dubious proposition. If, for example, another medical center or drug company had stolen all of the cells in question from the UCLA Medical Center laboratory and used them for its own benefit, there would be no question but that a cause of action for conversion would properly lie against the thief, and the majority opinion does not suggest otherwise. Thus, the majority's analysis cannot rest on the broad proposition that a removed body part is not property, but rather rests on the proposition that *a patient* retains no ownership interest in a body part once the body part has been removed from his or her body.

The majority opinion fails to recognize, however, that, in light of the allegations of the present complaint, the pertinent inquiry is not whether a patient generally retains an ownership interest in a body part after its removal from his body, but rather whether a patient has a right to determine, before a body part is removed, the use to which the part will be put after removal. Although the majority opinion suggests that there are "reasons to doubt" that a patient retains "any" ownership interest in his organs or cells after removal (maj. opn., *ante*, p. — [typed maj. opn. p. 27]), the opinion fails to identify any statutory provision or common law authority that indicates that a patient does not generally have the right, before a body part is removed, to choose among the permissible uses to which the part may be put after removal. On the contrary, the most closely related statutory scheme—the Uniform Anatomical Gift Act (Health & Saf. Code, § 7150 et seq.)[2]—makes it quite clear that a patient does have this right.

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[2] Unless otherwise noted, all section references are to the Health and Safety Code.

The Uniform Anatomical Gift Act is a comprehensive statutory scheme that was initially adopted in California in 1970 and most recently revised in 1988. Although that legislation, by its terms, applies only to a donation of all or part of a human body "which is to take effect upon or after [the] death [of the donor]" (§ 7150.1, subd. (a))—and thus is not directly applicable to the present case which involves a living donor—the act is nonetheless instructive with regard to this state's general policy concerning an individual's authority to control the use of a donated body part. The act, which authorizes an anatomical gift to be made, inter alia, to "[a] hospital [or a] physician[,] . . . for transplantation, therapy, medical or dental education, research or advancement of medical or dental science" (§ 7153, subd. (a)(1)), expressly provides that such a gift "may be made to a designated donee or without designating a donee" (§ 7153, subd. (b)) and also that the donor may make such a gift "for any of the purposes [specified in the statute or may] limit an anatomical gift to one or more of those purposes . . . ." (§ 7150.5, subd. (a).) Thus, the act clearly recognizes that it is the donor of the body part, rather than the hospital or physician who receives the part, who has the authority to designate, within the parameters of the statutorily authorized uses to which the part may be put.

Although, as noted, the Uniform Anatomical Gift Act applies only to anatomical gifts that take effect on or after the death of the donor, the general principle of "donor control" which the act embodies is clearly not limited to that setting. In the transplantation context, for example, it is common for a living donor to designate the specific donee—often a relative—who is to receive a donated organ. If a hospital, after removing an organ from such a donor, decided on its own to give the organ to a different donee, no one would deny that the hospital had violated the legal right of the donor by its unauthorized use of the donated organ. Accordingly, it is clear

under California law that a pateint has the right, prior to the removal of an organ, to control the use to which the organ will be put after removal.

It is also clear, under traditional common law principles, that this right of a patient to control the future use of his organ is protected by the law of conversion. As a general matter, the tort of conversion protects an individual not only against improper interference with the right of possession of his property but also against unauthorized use of his property or improper interference with his right to control the use of his property. Sections 227 and 228 of the Restatement Second of Torts specifically provide in this regard that "[o]ne who uses a chattel in a manner which is a serious violation of the right of another to control its use is subject to liability to the other for conversion" and that "[o]ne who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated." California cases have also long recognized that "unauthorized use" of property can give rise to a conversion action. (See *Hollywood M. P. Equipment Co.* v. *Furer* (1940) 16 Cal.2d 184, 189. See generally 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 622, p. 716.)

The application of these principles to the present case is evident. If defendants had informed plaintiff, prior to removal, of the possible uses to which his body part could be put and plaintiff had authorized one particular use, it is clear under the foregoing authorities that defendants would be liable for conversion if they disregarded plaintiff's decision and used the body part in an unauthorized manner for their own economic benefit. Although in this case defendants did not disregard a specific directive from plaintiff with regard to the future use of his body part, the complaint alleges that, before the body part was removed, defendants intentionally withheld material information that they were under an ob-

ligation to disclose to plaintiff and that was necessary for his exercise of control over the body part; the complaint also alleges that defendants withheld such information in order to appropriate the control over the future use of such body part for their own economic benefit. If these allegations are true, defendants clearly improperly interfered with plaintiff's right in his body part at a time when he had the authority to determine the future use of such part, thereby misappropriating plaintiff's right of control for their own advantage. Under these circumstances, the complaint fully satisfies the established requirements of a conversion cause of action.

As already noted, the majority maintains that there are a number of "reasons to doubt" that a patient retains any legally protectible interest in his organs after removal (maj. opn., *ante*, p. — [typed maj. opn. p. 27]), but none of these reasons withstands scrutiny. The majority first relies on the fact that "no reported judicial decision supports Moore's claim, either directly or by close analogy." (Maj. opn., *ante*, p. — [typed maj. opn. p. 27].) By the same token, however, there is no reported judicial decision that rejects such a claim. This is simply a case of first impression. And while the majority goes on to emphasize that it is the "specialized statutes" dealing with human biological materials to which the court should look for guidance in determining whether a patient has any legal rights with respect to an organ after removal (maj. opn., *ante*, p. — [typed maj. opn. p. 29]), the majority fails to recognize that the Uniform Anatomical Gift Act, as we have seen, expressly confirms a patient's right to designate, prior to removal, the use to which a body part will be put. (See *ante*, p. — [typed conc. & dis. opn. pp. 9-10].)

The majority next relies on the provisions of section 7054.4,[3] a statute that addresses the potential health

[3] Section 7054.4 provides: "Notwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical

hazards posed by the improper disposal of human body parts, reasoning that this statute "drastically limits a patient's control over excised cells." (Maj. opn., *ante*, p. — [typed maj. opn. p. 34].) While I agree with the majority that section 7054.4 should reasonably be interpreted to apply to body parts removed from a living patient as well as from dead bodies, the statute nonetheless provides absolutely no support for the majority's conclusion. Although section 7054.4 limits a patient's control over an excised body part in the sense that it prohibits him from taking the removed part to his home and keeping it on his mantel, the statute certainly does not suggest that a patient does not have the right to choose among the legally permissible uses of his organ. Similarly, there is nothing in section 7054.4 which indicates that a doctor or medical facility that removes a patient's organ possesses any greater right than the patient himself to choose the further use to which the removed organ will be put. Since the majority does not suggest that the provisions of section 7054.4 should be interpreted to prohibit the research or commercial activities at issue in this case—and I agree that the statute cannot reasonably be interpreted to prohibit such use —I cannot understand how section 7054.4 provides any assistance to the majority's argument.

Finally, the majority maintains that plaintiffs' conversion action is not viable because "the subject matter of the Regent's patent—the patented cell line and the products derived from it—cannot be Moore's property." (Maj. opn., ante, p. — [typed maj. opn. p. 37].) Even if this is an accurate statement of federal patent law, it does not explain why plaintiff may not maintain a conversion action for defendants' unauthorized use of

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human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety."

his own body parts, blood, blood serum, bone marrow, and sperm. Although the damages which plaintiff may recover in a conversion action may not include the value of the patent and the derivative products, the fact that plaintiff may not be entitled to all of the damages which his complaint seeks does not justify denying his right to maintain any conversion action at all. Similarly, although the question whether plaintiff's cells are "unique" may well affect the amount of damages plaintiff will be able to recover in a conversion action, the question of uniqueness has no proper bearing on plaintiff's basic right to maintain a conversion action; ordinary property, as well as unique property, is, of course, protected against conversion.

Thus, unlike the majority, I conclude that under established common law principles the facts alleged in the complaint state a cause of action for conversion.[4]

III

Although the majority opinion does not acknowledge common law principles, its reasoning suggests that the majority would, in any event, conclude that considera-

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[4] The majority opinion inaccurately characterizes this opinion as proposing the creation of "a new cause of action" that would "extend conversion liability" by requiring the allegation of a new element of fraud in addition to the traditional elements of a conversion cause of action. (See maj. opn., *ante*, p. ——, fn. 41 [typed maj. opn. p. 47, fn. 41].) As explained above, my position is that the facts alleged in the present complaint state a cause of action for conversion under traditional, well-established common law principles. Contrary to the implication of the majority's assertion, it requires no extension of existing common law principles to recognize that a conversion action will lie where the facts alleged in a complaint demonstrate that the defendant obtained the plaintiff's consent by fraud. (See generally 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 621, p. 715; Rest.2d Torts, §§ 221, 229.) In reality, it is the majority opinion that departs from established common law principles by fashioning a novel exception that shields the defendants in this case from the ordinary reach of conversion liability.

tions of public policy support a judicially crafted limitation on a patient's right to sue anyone involved in medical research activities for conversion of a patient's excised organs or cells. (Maj. opn., *ante*, pp. — - — [typed maj. opn. pp. 39-48].) For a number of reasons, I cannot agree that this court should carve out such a broad immunity from general conversion principles.

One of the majority's principal policy concerns is that "[t]he extension of conversion law into this area will hinder research by restricting access to the necessary raw materials"—the thousands of cell lines and tissues already in cell and tissue repositories. (Maj. opn, *ante*, p. — [typed maj. opn. p. 43].) The majority suggests that the "exchange of scientific materials, which still is relatively free and efficient, will surely be compromised if each cell sample becomes the potential subject matter of a lawsuit." (Maj. opn., *ante*, p. — [typed maj. opn. p. 44].)

This policy argument is flawed in a number of respects. First, the majority's stated concern does not provide any justification for barring plaintiff from bringing a conversion action against a party who does not obtain organs or cells from a cell bank but who directly interferes with or misappropriates a patient's right to control the use of his organs or cells. Although the majority opinion suggests that the availability of a breach-of-fiduciary-duty cause of action obviates any need for a conversion action against this category of defendants (see maj. opn., *ante*, p. — [typed maj. opn. pp. 49-50]), the existence of a breach-of-fiduciary-duty cause of action does not provide a complete answer. Even if in this case plaintiff may obtain the same remedy against such defendants under a breach-of-fiduciary-duty theory as he could under a conversion cause of action, in other factual settings an unlawful interference with a patient's right to control the use of his body part may occur in the absence of a breach of fiduciary duty. For example, if a patient donated his removed cells to a medical center, reserving the right to

approve or disapprove the research projects for which the cells would be used, and if another medical center or a drug manufacturer stole the cells after removal and used them in an unauthorized manner for its own economic gain, no breach-of-fiduciary-duty cause of action would be available and a conversion action would be necessary to vindicate the patient's rights. Under the majority's holding, however, the patient would have no right to bring a conversion action even against such a thief. As this hypothetical illustrates, even if there were compelling policy reasons to limit the potential liability of innocent researchers who use cells obtained from an existing cell bank, those policy considerations would not justify the majority's broad abrogation of *all* conversion liability for the unauthorized use of body parts.

Second, even with respect to those persons who are not involved in the initial conversion, the majority's policy arguments are less than compelling. To begin with, the majority's fear that the availability of a conversion remedy will restrict access to existing cell lines is unrealistic, In the vast majority of instances the tissues and cells in existing repositories will *not* represent a potential source of liability because they will have come from patients who consented to their organ's use for scientific purposes under circumstances in which such consent was not tainted by a failure to disclose the known valuable nature of the cells. Because potential liability under a conversion theory will exist in only the exceedingly rare instance in which a doctor knowingly concealed from the patient the value of his body part or the patient's specific directive with regard to the use of the body part was disregarded, there is no reason to think that application of settled conversion law will have any negative effect on the primary conduct of medical researchers who use tissue and cell banks.

Furthermore, even in the rare instance—like the present case—in which a conversion action might be successfully

pursued, the potential liability is not likely "to destroy the economic incentive to conduct important medical research," as the majority asserts. (Maj. opn., *ante*, p. — [typed maj. opn. p. 46].) If, as the majority suggests, the great bulk of the value of a cell line patent and derivative products is attributable to the efforts of medical researchers and drug companies, rather than to the "raw materials" taken from a patient (maj. opn., *ante*, p. — [typed maj. opn. pp. 37-38]), the patient's damages will be correspondingly limited, and innocent medical researchers and drug manufacturers will retain the considerable economic benefits resulting from their own work. Under established conversion law, a "subsequent innocent converter" does not forfeit the proceeds of his own creative efforts, but rather "is entitled to the benefit of any work or labor that he has expended on the [property] . . . ." (1 Harper et al., The Law of Torts (2d ed. 1986) § 2.34, p. 234. See generally Rest. 2d Torts, § 927, coms. f, g.)

Finally, the majority's analysis of the relevant policy considerations tellingly omits a most pertinent consideration. In identifying the interests of the patient that are implicated by the decision whether to recognize a conversion cause of action, the opinion speaks only of the "patient's right to make autonomous medical decisions" (maj. opn., *ante*, p. — [typed maj. opn. p. 40] and fails even to mention the patient's interest in obtaining the economic value, if any, that may adhere in the subsequent use of his own body parts. Although such economic value may constitute a fortuitous "windfall" to the patient (maj. opn., *ante*, p. — [typed maj. opn. p. 48]), the fortuitous nature of the economic value does not justify the creation of a novel exception from conversion liability which sanctions the intentional misappropriation of that value from the patient.

This last point reveals perhaps the most serious flaw in the majority's public policy analysis in this case. It is certainly arguable that, as a matter of policy or morality, it would be wiser to prohibit any private individual or

entity from profiting from the fortuitous value that adheres in a part of a human body, and instead to require all valuable excised body parts to be deposited in a public repository which would make such materials freely available to all scientists for the betterment of society as a whole. The Legislature, if it wished, could create such a system, as it has done with respect to organs that are donated for transplantation. (See § 7155, subd. (a); Pen. Code, § 367f. See also 42 U.S.C. § 274e.) To date, however, the Legislature has not adopted such a system for organs that are to be used for research or commercial purposes,[5] and the majority opinion, despite some oblique

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[5] As the dissent points out (dis. opn., *post*, pp ——-—— [typed dis. opn. pp. 34-35]), although the Uniform Anatomical Gift Act expressly authorizes the gift of body parts for the purposes of "transplantation, therapy, medical or dental education, research, or advancement of medical or dental science" (§ 7153, subd. (a)(1)), the provision of the act that is specifically concerned with the purchase or sale of a body part for valuable consideration only prohibits a person from knowingly purchasing or selling a body part "for transplantation [or] therapy" (§ 7155, subd. (a)), and does not extend its prohibition to purchases or sales of body parts for the other purposes authorized by the statute, i.e., for research, education, or the advancement of medical science.

A comment to the section of the model Uniform Anatomical Gift Act on which section 7155 was based explains the basis for the prohibition on sale of body parts for transplantation or therapy: "'Altruism and a desire to benefit other members of the community are important moral reasons which motivate many to donate. Any perception on the part of the public that transplantation unfairly benefits those outside the community, those who are wealthy enough to afford transplantation, or that it is undertaken primarily with an eye toward profit rather than therapy will severely imperil the moral foundations, and thus the efficacy of the system.'" (8A, West's U Laws Annot. (1990 pocket pt.) Anatomical Gift Act (1987) § 10, p. 25.) The drafters of the provision apparently concluded that this rationale did not warrant extending the prohibition on purchase or sale to the sale of body parts that are to be used for any of the statutorily authorized purposes other than transplantation or therapy.

Given the current provisions of the Uniform Anatomical Gift Act, there is no basis to conclude that there is a general public policy

suggestions to the contrary (see maj. opn., *ante*, pp. ——— [typed maj. opn. pp. 43-44]), emphatically does not do so by its holding in this case. Justice Arabian's concurring opinion suggests that the majority's conclusion is informed by the precept that it is immoral to sell human body parts for profit. (See conc. opn., *ante*, pp. ——— [typed conc. opn. pp. 1-2].) But the majority's rejection of plaintiff's conversion cause of action does *not* mean that body parts may not be bought or sold for research or commercial purposes or that *no* private individual or entity may benefit economically from the fortuitous value of plaintiff's diseased cells. Far from elevating these biological materials above the marketplace, the majority's holding simply bars *plaintiff*, the source of the cells, from obtaining the benefit of the cells' value, but permits *defendants*, who allegedly obtained the cells from plaintiff by improper means, to retain and exploit the full economic value of their ill-gotten gains free of their ordinary common law liability for conversion.

Because I conclude that plaintiff's complaint states a cause of action for conversion under traditional common law principles, I dissent from the majority opinion insofar as it rejects such a claim.

BROUSSARD, J.

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in this state prohibiting hospitals or medical centers from giving, or prohibiting patients from receiving, valuable consideration for body parts which are to be used for medical research or the advancement of medical science.

DISSENTING OPINION BY MOSK, J.

I dissent.

Contrary to the principal holding of the Court of Appeal, the majority conclude that the complaint does not—in fact cannot—state a cause of action for conversion. I disagree with this conclusion for all the reasons stated by the Court of Appeal, and for additional reasons that I shall explain. For convenience I shall discuss the six premises of the majority's conclusion in the order in which they appear.

1.

The majority first take the position that Moore has no cause of action for conversion under existing law because he retained no "ownership interest" in his cells after they were removed from his body. (Maj. opn., *ante*, p. — [typed maj. opn. p. 27].) To state a conversion cause of action a plaintiff must allege his "ownership or right to possession of the property at the time of the conversion" (*Baldwin v. Marina City Properties, Inc.* (1978) 79 Cal.App.3d 393, 410). Here the complaint defines Moore's "Blood and Bodily Substances" to include inter alia his blood, his bodily tissues, his cells, and the cell lines derived therefrom.[1] Moore thereafter alleges that "he is the owner of his Blood and Bodily Substances and of the by-products produced therefrom . . . ." And he further alleges that such blood and bodily activities "are his tangible personal property, and the activities of the defendants as set forth herein constitute a substantial interference with plaintiff's possession or right thereto, as well as defendants' wrongful exercise of dominion over plaintiff's personal property rights in his Blood and Bodily Substances."

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[1] A cell line is a cell culture that is capable of continuous and indefinite growth in vitro. (U.S. Congress, Office of Technology Assessment, New Developments in Biotechnology: Ownership of Human Tissues and Cells (1987) p. 33 (hereafter OTA Report).)

The majority impliedly hold these allegations insufficient as a matter of law, finding three "reasons to doubt" that Moore retained a sufficient ownership interest in his cells, after their excision, to support a conversion cause of action. (Maj. opn., *ante*, p. —— [typed maj. opn. p. 27].) In my view the majority's three reasons, taken singly or together, are inadequate to the task.

The majority's first reason is that "no reported judicial decision supports Moore's claim, either directly or by close analogy." (Maj. opn., *ante*, p. —— [typed maj. opn. p. 27].) Neither, however, is there any reported decision rejecting such a claim. The issue is as new as its source —the recent explosive growth in the commercialization of biotechnology.

The majority next cite several statutes regulating aspects of the commerce in or disposition of certain parts of the human body, and conclude in effect that in the present case we should also "look for guidance" to the Legislature rather than to the law of conversion. (*Id.* at p.—— [typed maj. opn. p. 29].) Surely this argument is out of place in an opinion of the highest court of this state. As the majority acknowledge, the law of conversion is a creature of the common law. " 'The inherent capacity of the common law for growth and change is its most significant feature. Its development has been determined by the social needs of the community which it serves. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society, and adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country.' [Citation.] [¶] In short, as the United States Supreme Court has aptly said, 'This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.' [Citation] . . . Although the Legislature may of course speak to the subject, in the common law system the primary instruments of this evolution are the courts, adjudicating on a regular

basis the rich variety of individual cases brought before them." (*Rodriguez* v. *Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394.)

Especially is this true in the field of torts. I need not review the many instances in which this court has broken fresh ground by announcing new rules of tort law: time and again when a new rule was needed we did not stay our hand merely because the matter was one of first impression.[2] For example, in *Sindell* v. *Abbott Laboratories* (1980) 26 Cal.3d 588, we adopted a "market share" theory of liability for injury resulting from administration of a prescription drug and suffered by a plaintiff who without fault cannot trace the particular manufacturer of the drug that caused the harm. Like the opinion in the case at bar, the dissent in *Sindell* objected that market share liability was "a wholly new theory" and an "unprecedented extension of liability" (*id.* at pp. 614, 615), and urged that in view of the economic, social, and medical effects of this new rule the decision to adopt it should rest with the Legislature (*id.* at p. 621). We nevertheless declared the new rule for sound policy reasons, explaining that "In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs." (*Id.* at p. 1610.) We took the latter course.[3]

The case at bar, of course, does not involve a drug-induced injury. Yet it does present a claim arising, like Sindell's, from "advances in science and technology" that

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[2] See, e.g., the cases collected in *Rodriguez* v. *Bethlehem Steel Corp.*, *supra*, 12 Cal.3d at pages 394-396.

[3] Other jurisdictions have followed us, most recently New York's highest court. (*Hymowitz* v. *Eli Lilly and Co.* (N.Y. 1989) 539 N.E.2d 1069, 1076-1078.)

could not have been foreseen when traditional tort doctrines—here, the law of conversion—was formulated. My point is that if the cause of action for conversion is otherwise an appropriate remedy on these facts, we should not refrain from fashioning it simply because another court has not yet so held or because the Legislature has not yet addressed the question. We need not wait on either event, because neither is a precondition to an exercise of our long-standing "power to insure the just and rational development of the common law in our state" (*Rodriguez* v. *Bethlehem Steel Corp.*, *supra*, 12 Cal.3d 382, 394).[4]

2.

The majority's second reason for doubting that Moore retained an ownership interest in his cells after their excision is that "California statutory law . . . drastically limits a patient's control over excised cells." (Maj. opn., *ante*, p. —— [typed maj. opn. p. 34].) For this proposition the majority rely on Health and Safety Code section 7054.4 (hereafter section 7054.4), set forth in the margin.[5] The majority concede that the statute was not meant

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[4] The majority cite three cases declining to apply other tort doctrines in different factual contexts, but in each we based our decision mainly on traditional reasons of policy. (*Nally* v. *Grace Community Church* (1988) 47 Cal.3d 278, 294-300; *Foley* v. *Interactive Data Corp.* (1988) 47 Cal.3d 654, 696-700; *Brown* v. *Superior Court* (1988) 44 Cal.3d 1049 1061-1065.) As will appear (pt. 4, *post*), in my view the single policy reason offered by the majority for rejecting a conversion cause of action here is unpersuasive and is outweighed by policy reasons to the contrary.

[5] Section 7054.4 provides:

"Notwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety.

"As used in this section, 'infectious waste' means any material or article which has been, or may have been, exposed to contagious or infectious disease."

to directly resolve the question whether a person in Moore's position has a cause of action for conversion, but reason that it indirectly resolves the question by limiting the patient's control over the fate of his excised cells: "By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to 'property' or 'ownership' for purposes of conversion law." (Maj. opn., *ante*, p. —— [typed maj. opn. pp. 35-36].) As will appear, I do not believe section 7054.4 supports the just quoted conclusion of the majority.

First, in my view the statute does not authorize the principal use that defendants claim the right to make of Moore's tissue, i.e., its commercial exploitation. In construing section 7054.4, of course, "we look first to the words of the statute themselves" (*Long Beach Police Officers Assn.* v. *City of Long Beach* (1988) 46 Cal.3d 736, 741), and give those words their usual and ordinary meaning (*California Teachers Assn.* v. *San Diego Community Dist.* (1981) 28 Cal.3d 692, 698).

By its terms, section 7054.4 permits only "scientific use" of excised body parts and tissue before they must be destroyed. We must therefore determine the usual and ordinary meaning of that phrase. I would agree that "scientific use" at least includes routine postoperative examination of excised tissue conducted by a pathologist for diagonstic or prognostic reasons (e.g., to verify preoperative diagnosis or to assist in determining postoperative treatment). I might further agree that "scientific use" could be extended to include purely sceintific study of the tissue by a disinterested researcher for the purpose of advancing medical knowledge—provided of course that the patient gave timely and informed consent to that use. It would stretch the English language beyond recognition, however, to say that commercial exploitation of the kind

and degree alleged here is also a usual and ordinary meaning of the phrase "scientific use."

The majority dismiss this difficulty by asserting that I read the statute to define "scientific use" as "not-for-profit scientific use," and by finding "no reason to believe that the Legislature intended to make such a distinction." (Maj. opn., *ante*, p. — [typed maj. opn. p. 36], fn. 34.) The objection misses my point. I do not stress the concept of profit, but the concept of *science*: the distinction I draw is not between nonprofit scientific use and scientific use that happens to lead to a marketable by-product; it is between a truly *scientific* use and the blatant *commercial* exploitation of Moore's tissue that the present complaint alleges. Under those allegations, defendants Dr. David W. Golde and Shirley G. Quan were not only scientists, they were also full-fledged entrepreneurs: the complaint repeatedly declares that they appropriated Moore's tissue in order "to further defendants' independent economic, financial and competitive interests." The complaint also alleges that defendant Regents of the University of California (hereafter Regents) actively assisted the individual defendants in applying for patent rights and in negotiating with bioengineering and pharmaceutical companies to exploit the commercial potential of Moore's tissue. Finally, the complaint alleges in detail the contractual arrangements between the foregoing defendants and defendants Genetics Institute, Inc., and Sandoz Pharmaceutical Corporation, giving the latter companies exclusive rights to exploit that commercial potential while providing substantial financial benefits to the individual defendants in the form of cash, stock options, consulting fees, and fringe benefits. To exclude such traditionally commercial activities from the phrase "scientific use," as I do here, does not give it a restrictive definition; rather, it gives the phrase its usual and ordinary meaning, as settled law requires.

Secondly, even if section 7054.4 does permit defendants' commercial exploitation of Moore's tissue under the

guise of "scientific use," it does not follow that—as the majority conclude—the statute "eliminates so many of the rights ordinarily attached to property" that what remains does not amount to "property" or "ownership" for purposes of the law of conversion. (Maj. opn., *ante*, p. — [typed maj. opn. p. 36].)

The concepts of property and ownership in our law are extremely broad. (See Civ. Code, §§ 654, 655.) A leading decision of this court approved the following definition: " 'The term "property" is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value.' " (*Yuba River Power Co.* v. *Nevada Irr. Dist.* (1929) 207 Cal. 521, 523.)

Being broad, the concept of property is also abstract: rather than referring directly to a material object such as a parcel of land or the tractor that cultivates it, the concept of property is often said to refer to a "bundle of rights" that may be exercised with respect to that object—principally the rights to possess the property, to use the property, to exclude other from the property, and to dispose of the property by sale or by gift. "Ownership is not a single concrete entity but a bundle of rights and privileges as well as of obligations." (*Union Oil Co.* v. *State Bd. of Equal.* (1963) 60 Cal.2d 441, 447.) But the same bundle of rights does not attach to all forms of property. For a variety of policy reasons, the law limits or even forbids the exercise of certain rights over certain forms of property. For example, both law and contract may limit the right of an owner of real property property to use his parcel as he sees fit.[6] Owners of

[6] Zoning or nuisance laws, or convenants running with the land or equitable servitudes, or condominium declarations, may prohibit certain uses of the parcel or regulate the number, size, location, etc.,

various forms of personal property may likewise be subject to restrictions on the time, place, and manner of their use.[7] Limitations on the disposition of real property, while less common, may also be imposed.[8] Finally, some types of personal property may be sold but not given away,[9] while others may be given away but not sold,[10] and still others may neither be given away nor sold.[11]

In each of the foregoing instances, the limitation or prohibition diminishes the bundle of rights that would otherwise attach to the property, yet what remains is

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of buildings an owner may erect on it. Even if rental of the property is a permitted use, rent control laws may limit the benefits of that use. Other uses may, on the contrary, be compelled: e.g., if the property is a lease to extract minerals, the lease may be forfeited by law or contract if the lessee does not exploit the resource. Historic preservation laws may prohibit an owner from demolishing a building on the property, or even from altering its appearance. And endangered species laws may limit an owner's right to develop the land from its natural state.

[7] Public health and safety laws restrict in various ways the manufacture, distribution, purchase, sale, and use of such property as food, drugs, cosmetics, tobacco, alcoholic beverages, firearms, flammable or explosive materials, and waste products. Other laws regulate the operation of private and commercial motor vehicles, aircraft, and vessels.

[8] Provisions in a condominium declaration may give the homeowners association a right of first refusal over a proposed sale by a member. Provisions in a commercial lease may require the lessor's consent to an assignment of the lease.

[9] A person contemplating bankruptcy may sell his property at its "reasonably equivalent value," but he may not make a gift of the same property. (See 11 U.S.C. § 548(a).)

[10] A sportsman may give away wild fish or game that he has caught or killed pursuant to his license, but he may not sell it. (Fish & Game Code, §§ 3039, 7121.)

The transfer of human organs and blood is a special case that I discuss below (pt. 5).

[11] E.g., a license to practice a profession, or a prescription drug in the hands of the person for whom it is prescribed.

still deemed in law to be a protectible property interest. "Since property or title is a complex bundle of rights, duties, powers and immunities, the pruning away of some or a great many of these elements does not entirely destroy the title . . . ." (*People* v. *Walker* (1939) 33 Cal. App.2d 18, 20 [even the possessor of contraband has certain property rights in it against anyone other than the state].) The same rule applies to Moore's interest in his own body tissue: even if we assume that section 7054.4 limited the use and disposition of his excised tissue in the manner claimed by the majority, Moore nevertheless retained valuable rights in that tissue. Above all, at the time of its excision he at least had *the right to do with his own tissue whatever the defendants did with it*: i.e., he could have contracted with researchers and pharmaceutical companies to develop and exploit the vast commercial potential of his tissue and its products. Defendants certainly believe that *their* right to do the foregoing is not barred by section 7054.4 and is a significant property right, as they have demonstrated by their deliberate concealment from Moore of the true value of his tissue, their efforts to obtain a patent on the Mo cell line, their contractual agreements to exploit this material, their exclusion of Moore from any participation in the profits, and their vigorous defense of this lawsuit. The Court of Appeal summed up the point by observing that "Defendants' position that plaintiff cannot own his tissue, but that they can, is fraught with irony." It is also legally untenable. As noted above, the majority cite no case holding that an individual's right to develop and exploit the commercial potential of his own tissue is *not* a right of sufficient worth or dignity to be deemed a protectible property interest. In the absence of such authority—or of legislation to the same effect—the right falls within the traditionally broad concept of property in our law.

3.

The majority's third and last reason for their conclusion that Moore has no cause of action for conversion under existing law is that "the subject matter of the Regents' patent—the patented cell line and the products derived from it—cannot be Moore's property." (Maj. opn., *ante*, p. — [typed maj. opn. p. 37].) The majority then offer a dual explanation: "This is because the patented cell line is *factually* and *legally* distinct from the cells taken from Moore's body." (*Ibid.*, italics added.) Neither branch of the explanation withstands analysis.

First, in support of their statement that the Mo cell line is "factually distinct" from Moore's cells, the majority assert that "Cells change while being developed into a cell line and continue to change over time," and in particular may acquire an abnormal number of chromosomes. (Maj. opn., *ante*, p. — [typed maj. opn. p. 37], fn. 35.) No one disputes these assertions, but they are nonetheless irrelevant. For present purposes no distinction can be drawn between Moore's cells and the Mo cell line. It appears that the principal reason for establishing a cell line is not to "improve" the quality of the parent cells but simply to extend their life indefinitely, in order to permit long-term study and/or exploitation of the qualities already present in such cells. The complaint alleges that Moore's cells naturally produced certain valuable proteins in larger than normal quantities; indeed, that was why defendants were eager to culture them in the first place. Defendants do not claim that the cells of the Mo cell line are in any degree more productive of such proteins than were Moore's own cells. Even if the cells of the Mo cell line in fact have an abnormal number of chromosomes, at the present stage of this case we do not know if that fact has any bearing whatever on their capacity to produce proteins; yet it is in the commercial exploitation of that capacity—not simply in their number of chromosomes—that Moore seeks to assert an

interest. For all that appears, therefore, the emphasized fact is a distinction without a difference.

Second, the majority assert in effect that Moore cannot have an ownership interest in the Mo cell line because defendants patented it.[12] The majority's point wholly fails to meet Moore's claim that he is entitled to compensation for defendants' unauthorized use of his bodily tissues *before* defendants patented the Mo cell line: defendants undertook such use immediately after the splenectomy on October 20, 1976, and continued to extract and use Moore's cells and tissue at least until September 20, 1983; the patent, however, did not issue until March 20, 1984, more than seven years after the unauthorized use began. Whatever the legal consequences of that event, it did not operate retroactively to immunize defendants from accountability for conduct occurring long before the patent was granted.

Nor did the issuance of the patent in 1984 necessarily have the drastic effect that the majority contend. To be sure, the patent granted defendants the exclusive right to make, use, or sell the invention for a period of 17 years. (35 U.S.C. § 154.) But Moore does not assert any such right for himself. Rather, he seeks to show that he is entitled, in fairness and equity, to some share in the profits that defendants have made and will make from their commercial exploitation of the Mo cell line. I do not question that the cell line is primarily the product of defendants' inventive effort. Yet likewise no one can ques-

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[12] The majority also assert that the patent constitutes an "authoritative" determination that the Mo cell line is a patentable invention. (Maj. opn., *ante*, p. —— [typed maj. opn. p. 38].) But to the extent that "authoritative" implies "conclusive," it is a misstatement of patent law. When granted by the United States Patent Office, a patent has only "prima facie validity": it is presumed valid, but the defendant in an infringement action may undertake to "establish that the patent is invalid on any one of a number of possible grounds, such as lack of novely, lack of invention, lack of utility, etc." (Amdur, Patent Fundamentals (1959) p. 86, fn. 7.)

tion Moore's crucial contribution to the invention—an invention named, ironically, after him: but for the cells of Moore's body taken by defendants, *there would have been no Mo cell line.* Thus the complaint alleges that Moore's "Blood and Bodily Substances were absolutely essential to defendants' research and commercial activities with regard to his cells, cell lines, [and] the Mo cell-line, . . . and that defendants could not have applied for and had issued to them the Mo cell-line patent and other patents described herein without obtaining and culturing specimens of plaintiff's Blood and Bodily Substance." Defendants admit this allegation by their demurrers, as well they should: for all their expertise, defendants do not claim they could have extracted the Mo cell line out of thin air.

Nevertheless the majority conclude that the patent somehow cut off all Moore's rights—past, present, and future,—to share in the proceeds of defendants' commercial exploitation of the cell line derived from his own body tissue. The majority cite no authority for this unfair result, and I cannot believe it is compelled by the general law of patents: a patent is not a license to defraud.[13] Perhaps the answer lies in an analogy to the concept of "joint inventor." I am aware that "patients and research subjects who contribute cells to research will not be considered inventors." (OTA Rep., *supra*, at p. 71.) Nor is such a person strictly speaking a "joint inventor" within

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[13] For example, it is hornbook law that "In patent [infringement] suits where equitable relief is sought, the defense of unclean hands may be interposed. The patent owner may have forced licensees under his patent to adopt illegal licensing provisions, or he may have committed any one of a large number of acts constituting fraud or fraudulent behavior. While only the United States government can bring suit to cancel a patent on the grounds of fraud, it is a valid defense in an infringement action that the patent was fraudulently issued to the patentee." (Seidel, What the General Practitioner Should Know About Patent Law and Practice (ALI 1956) p. 118.)

the meaning of the term in federal law. (35 U.S.C. § 116.) But he does fall within the spirit of that law: "The joint invention provision guarantees that all who contribute in a substantial way to a product's development benefit from the reward that the product brings. Thus, the protection of joint inventors encourages scientists to cooperate with each other and ensures that each contributor is rewarded fairly.

"Although a patient who donates cells does not fit squarely within the definition of a joint inventor, the policy reasons that inform joint inventor patents should also apply to cell donors. Neither John Moore nor any other patient whose cells become the basis for a patentable cell line qualifies as a 'joint inventor' because he or she did not further the development of the product in any intellectual or conceptual sense. Nor does the status of patients as sole owners of a component part make them deserving of joint inventorship status. What the patients did do, knowingly, or unknowingly, is collaborate with the researchers by donating their body tissue. . . . By providing the researchers with unique raw materials, without which the resulting product could not exist, the donors become necessary contributors to the product. Concededly, the patent is not granted for the cell as it is found in nature, but for the modified biogenetic product. However, the uniqueness of the product that gives rise to its patentability stems from the uniqueness of the original cell. *A patient's claim to share in the profits flowing from a patent would be analogous to that of an inventor whose collaboration was essential to the success of a resulting product. The patient was not a coequal, but was a necessary contributor to the cell line.*" (Danforth, *Cells, Sales, & Royalties: The Patient's Right to a Portion of the Profits* (1988) 6 Yale L. & Pol'y Rev. 179, 197, fns. omitted, italics added (hereafter Danforth).)

Under this reasoning, which I find persuasive, the law of patents would not be a bar to Moore's assertion of an

ownership interest in his cells and their products sufficient to warrant his sharing in the proceeds of their commercial exploitation.

4.

Having concluded—mistakenly, in my view—that Moore has no cause of action for conversion under existing law, the majority next consider whether to "extend" the conversion cause of action to this context. Again the majority find three reasons not to do so, and again I respectfully disagree with each.

The majority's first reason is that a balancing of the "relevant policy considerations" counsels against recognizing a conversion cause of action in these circumstances. (Maj. opn., *ante*, p. —[typed maj. opn. p. 39].) The memo identifies two such policies, but concedes that one of them—"protection of a competent patient's right to make autonomous medical decisions" (*id.* at p. —[typed maj. opn. p. 40])—would in fact be promoted, even though "indirectly," by recognizing a conversion cause of action. (*Id.* at p. —[typed maj. opn. p. 42].)

The majority focus instead on a second policy consideration i.e., their concern "that we not threaten with disabling civil liability innocent parties who are engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor's wishes." (Maj. opn., *ante*, p. — [typed maj. opn. p. 40]). As will appear, in my view this concern is both overstated and outweighed by contrary considerations.[14]

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[14] On this record the majority's solicitude for the protection of "innocent parties" seems ironic. The complaint is replete with factual allegations—which we must accept as true on this appeal—to the effect that defendants repeatedly lied to Moore about their commercial exploitation of his tissue. For example, the complaint contains detailed allegations that defendants falsely told Moore that his numerous postoperative trips from his home in Seattle to the

The majority begin their analysis by stressing the obvious facts that research on human cells plays an increasingly important role in the progress of medicine, and that the manipulation of those cells by the methods of biotechnology has resulted in numerous beneficial products and treatments. Yet it does necessarily follow that, as the majority claim, application of the law of conversion to this area "will hinder research by restricting access to the necessary raw materials," i.e., to cells, cell cultures, and cell lines. (Maj. opn., *ante*, p. — [typed maj. opn. p. 43].) The majority observe that many researchers obtain their tissue samples, routinely and at little or no cost, from cell-culture repositories. The majority then speculate that "This exchange of scientific materials, which is still relatively free and efficient, will surely be compromised if each cell sample becomes the potential subject matter of a lawsuit." (Maj. opn., *ante*, p. — [typed maj. opn. p. 44].) There are two grounds to doubt that this prophecy will be fulfilled.

To begin with, if the relevant exchange of scientific materials was ever "free and efficient," it is much less so today. Since biological products of genetic engineering became patentable in 1980 (*Diamond v. Chakrabarty* (1980) 447 U.S. 303), human cell lines have been amenable to patent protection and, as the Court of Appeal ob-

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Medical Center of the University of California at Los Angeles between 1976 and 1983 were necessary because his blood and other bodily fluids could be extracted only by them at the latter facility; that defendants falsely told Moore that the purpose of such extractions was to promote his health, when in fact it was solely to promote defendants' ongoing research and commercial activities; and that even when Moore expressly asked if defendants had discovered anything about his blood that might have potential commercial value, defendants falsely told him "they had discovered nothing of any commercial or financial value in his Blood or Bodily Substances, and in fact actively discouraged such inquiries." These are not the acts of "innocent parties."

served in its opinion below, "The rush to patent for exclusive use has been rampant." Among those who have taken advantage of this development, of course, are the defendants herein: as we have seen, defendants Golde and Quan obtained a patent on the Mo cell line in 1984 and assigned it to defendant Regents. With such patentability has come a drastic reduction in the formerly free access of researchers to new cell lines and their products: the "novelty" requirement for patentability prohibits public disclosure of the invention at all times up to one year before the filing of the patent application. (35 U.S.C. § 102(b).) Thus defendants herein recited in their patent specification, "At no time has the Mo cell line been available to other than the investigators involved with its initial discovery and only the conditioned medium from the cell line has been made available to a limited number of investigators for collaborative work with the original discoverers of the Mo cell line."

An even greater force for restricting the free exchange of new cell lines and their products has been the rise of the biotechnology industry and the increasing involvement of academic researchers in that industry.[15] When scientists became entrepreneurs and negotiated with biotechnological and pharmaceutical companies to develop and exploit the commercial potential of their discoveries—as did defendants in the case at bar—layers of contractual re-

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[15] Biotechnology itself began as an academic research activity, and the universities remain a major source of expertise in the field. This connection has led to a relationship of unparalleled intimacy between universities and biotechnology companies: "Commercial ventures between universities and the biotechnology industry now include consulting arrangements, licensing of new technology for development, sponsored research projects, research partnerships, industrial associate programs, and the formation of research departments and institutes." (Howard, *Biotechnology, Patients' Rights, and the Moore Case* (1989) 44 Food Drug Cosm. L.J. 331, 338, fn. 65 (hereafter Howard); accord, OTA Rep., *supra*, at pp. 61-62.)

strictions were added to the protections of the patent law.[16]

In their turn, the biotechnological and pharmaceutical companies demanded and received exclusive rights in the scientists' discoveries, and frequently placed those discoveries under trade secret protection. Trade secret protection is popular among biotechnology companies because, among other reasons, the invention need not meet the strict standards of patentability and the protection is both quickly acquired and unlimited in duration. (Note, *Patent and Trade Secret Protection in University-Industry Research Relationships in Biotechnology* (1987) 24 Harv. Law. J. on Legis. 191, 218-219.)[17] Secrecy as a normal business practice is also taking hold in university research laboratories, often because of industry pressure (*id.* at pp. 204-208): "One of the most serious fears associated with university-industry cooperative research concerns keeping work private and not disclosing it to the researcher's peers. [Citation.] . . . Economic arrangements between industry and universities inhibit open communication between researchers, especially for those who are financially tied to smaller biotechnology firms." (Howard, *supra*, 44 Food Drug Cosm. L.J. at p. 339, fn. 72.)

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[16] "Besides patent protection, intangible property rights in human biologics arise through contractual ordering. Before the commercial potential of genetic engineering on human cells became evident, scientists freely transferred cell lines and cell products. As the commercial value of the cell lines developed, originators of cell lines and cell products found written agreements increasingly necessary to protect economic rights in their creations." (Note, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue* (1986) 34 UCLA L. Rev. 207, 223, fns. omitted (hereafter *Toward the Right of Commerciality*).)

[17] In California, trade secret protection for new microorganisms is also expressly granted by the criminal law. (Pen. Code, § 499c, subd. (a)(2).)

Secondly, to the extent that cell cultures and cell lines may still be "freely exchanged," e.g., for purely research purposes, it does not follow that the researcher who obtains such material must necessarily remain ignorant of any limitations on its use: by means of appropriate recordkeeping, the researcher can be assured that the source of the material has consented to his proposed use of it, and hence that such use is not a conversion. To achieve this end the originator of the tissue sample first determines the extent of the source's informed consent to its use—e.g., for research only, or for public but academic use, or for specific or general commercial purposes; he then enters this information in the record of the tissue sample, and the record accompanies the sample into the hands of any researcher who thereafter undertakes to work with it. "Record keeping would not be overly burdensome because researchers generally keep accurate records of tissue sources for other reasons: to trace anomalies to the medical history of the patient, to maintain title for other researchers and for themselves, and to insure reproducibility of the experiment." (*Toward the Right of Commerciality*, *supra*, 34 UCLA L.Rev. at p. 241.) As the Court of Appeal correctly observed, any claim to the contrary "is dubious in light of the meticulous care and planning necessary in serious modern medical research."

The majority rely on *Brown* v. *Superior Court*, *supra*, 44 Cal.3d 1049 (hereafter *Brown*), but the case is plainly distinguishable. In a unanimous opinion that I authored for the court, we considered inter alia whether pharmaceutical manufacturers should be held strictly liable for injuries caused by "defectively designed" prescription drugs. We declined to so hold for several policy reasons. (*Id.* at pp. 1063-1065.) One of those reasons was our concern that "the fear of large adverse monetary judgments" might dissuade such manufacturers from developing or distributing potentially beneficial new drugs. (*Id.* at p. 1063.) The majority now seek to draw an analogy

between *Brown* and the case at bar, but the analogy fails because liability exposure in the *Brown* context is qualitatively far greater. As we acknowledge in *Brown*, "unlike other important medical products . . . harm to some users from prescription drugs is *unavoidable*." (*Ibid.*, italics added.) On an industry-wide basis, therefore, the imposition of strict liability for defective prescription drugs would inevitably result in hundreds, if not thousands, of meritorious claims by often seriously harmed plaintiffs, most of them likely to be seeking exemplary as well as compensatory damages.[18] Given the innocence and vulnerability of the typical plaintiff in such cases, sympathetic juries might well return substantial verdicts again and again, and the industry's total liability could reach intimidating proportions. Indeed, in *Brown* we chronicled actual instances in which the mere threat of such liability did cause the industry to refuse to supply new prescription drugs. (*Id.* at p. 1064.)

None of the foregoing is true in the case at bar. The majority claim that a conversion cause of action threatens to "destroy the economic incentive" to conduct the type of research here in issue (maj. opn., *ante*, p. —— [typed maj. opn. p. 46]), but it is difficult to take this hyperbole seriously. First, the majority reason that with every cell sample a researcher "purchases a ticket in a litigation lottery." (*Id.* at p. —— [typed maj. opn. pp. 46-47].) This is a colorful image, but it does not necessarily reflect reality: as explained above, with proper recordkeeping the researcher acquires not a litigation-lottery ticket but the information he needs precisely in order to avoid litigation. In contrast to *Brown*, therefore, here the harm is by no means "unavoidable." Second, the risk at hand is

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[18] *Brown* (44 Cal.3d at p. 1055) is itself an example of such multiplicity of actions: the case involved at least 69 lawsuits filed in the same court for personal injuries caused by just 1 drug, and a typical complaint named 170 or more pharmaceutical companies as defendants.

not of a multiplicity of actions: in *Brown* the harm would be suffered by many members of the public—the users of the end product of the process of developing the new drug—while here it can be suffered by ony one person—the original source of the research material that began that process. Third, the harm to the latter will be primarily economic, rather than the potentially grave physical injuries at issue in *Brown*.

In any event, in my view whatever merit the majority's single policy consideration may have is outweighed by two contrary considerations, i.e., policies that are promoted by recognizing that every individual has a legally protectible property interest in his own body and its products. First, our society acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona. One manifestation of that respect is our prohibition against direct abuse of the body by torture or other forms of cruel or unusual punishment. Another is our prohibition against indirect abuse of the body by its economic exploitation for the sole benefit of another person. The most abhorrent form of such exploitation, of course, was the institution of slavery. Lesser forms, such as indentured servitude or even debtor's prison, have also disappeared. Yet their specter haunts the laboratories and boardrooms of today's biotechnological research-industrial complex. It arises wherever scientists or industrialists claim, as defendants claim here, the right to appropriate and exploit a patient's tissue for their sole economic benefit—the right, in other words, to freely mine or harvest valuable physical properties of the patient's body: "Research with human cells that results in significant economic gain for the researcher and no gain for the patient offends the traditional mores of our society in a manner impossible to quantify. Such research tends to treat the human body as a commodity—a means to a profitable end. The dignity and sanctity with which we regard the human whole,

body as well as mind and soul, are absent when we allow researchers to further their own interests without the patient's participation by using a patient's cells as the basis for a marketplace product." (Danforth, *supra*, 6 Yale L. & Pol'y Rev. at p. 190, fn. omitted.)

A second policy consideration adds notions of equity to those of ethics. Our society values fundamental fairness in dealings between its members, and condemns the unjust enrichment of any member at the expense of another. This is particularly true when, as here, the parties are not in equal bargaining positions. We are repeatedly told that the commercial products of the biotechnological revolution "hold the promise of tremendous profit." (*Toward the Right of Commerciality*, *supra*, 34 UCLA L.Rev. at p. 211.)[19] In the case at bar, for example, the complaint alleges that the market for the kinds of proteins produced by the Mo cell line was predicted to exceed $3 billion by 1990. These profits are currently shared exclusively between the biotechnology industry and the universities that support that industry. The profits are shared in a wide variety of ways, including "direct entrepreneurial ties to genetic-engineering firms" and "an equity interest in fledgling biotechnology firms" (Howard, *supra*, 44 Food Drug Cosm. L.J. at p. 338). Thus the complaint alleges that because of his development of the Mo cell line defendant Golde became a paid consultant of defendant Genetics Institute and acquired the rights to 75,000 shares of that firm's stock at a cost of 1 cent each; that Genetics Institute further contracted to pay Golde and the Regents at least $330,000 over 3 years, including a pro rata share of Golde's salary and fringe benefits; and that defendant Sandoz Pharmaceuticals Corporation subsequently contracted to increase that compensation by a further $110,000.

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[19] In a footnote at this point the cited article reports published estimates of the market for biotechnological products, by the end of this decade, ranging from $15 billion to $100 billion. (*Toward the Right of Commerciality*, *supra*, 34 UCLA L. Rev. at p. 211, fn. 16.)

There is, however, a third party to the biotechnology enterprise—the patient who is the source of the blood or tissue from which all these profits are derived. While he may be a silent partner, his contribution to the venture is absolutely crucial: as pointed out above (pt. 3, *ante*), but for the cells of Moore's body taken by defendants there would have been no Mo cell line at all.[20] Yet defendants deny that Moore is entitled to any share whatever in the proceeds of this cell line. This is both inequitable and immoral. As Dr. Thomas H. Murray, a respected professor of ethics and public policy, testified before Congress, "the person [who furnishes the tissue] should be justly compensated. . . . If biotechnologists fail to make provision for a just sharing of profits with the person whose gift made it possible, the public's sense of justice will be offended and no one will be the winner." (Murray, *Who Owns the Body? On the Ethics of Using Human Tissue for Commercial Purposes* (Jan.-Feb. 1986) IRB: A Review of Human Subjects Research, at p. 5.)[21]

There will be such equitable sharing if the courts recognize that the patient has a legally protected property interest in his own body and its products: "property rights in one's own tissue would provide a morally acceptable result by giving effect to notions of fairness and pre-

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[20] It bears reiterating that "human cells are indispensable to the creation and production of human biologics." (*Toward the Right of Commerciality, supra*, 34 UCLA L. Rev. at p. 209.) In a footnote at this point (*id.* at fn. 6) the article explains: "Many incorrectly believe that biotechnology permits scientists to 'create' life. This simply is not the case. Presently, biotechnology allows only the manipulation, not the creation, of life. Although biotechnologists are able to cut and splice genes, to fuse cells, and even to mix the genetic information of humans with that of bacteria, they must start with a living cell as the raw material."

[21] The quoted view of Dr. Murray stands in stark contrast to the majority's disparaging remark that describes Moore's right to share in these profits as "a highly theoretical windfall." (Maj. opn., *ante*, p. —— [typed maj. opn. p. 48].)

venting unjust enrichment. . . . [¶] Societal notions of equity and fairness demand recognition of property rights. There are bountiful benefits, monetary and otherwise, to be derived from human biologics. To deny the person contributing the raw material a fair share of these ample benefits is both unfair and morally wrong." (*Toward the Right of Commerciality*, *supra*, 34 UCLA L.Rev. at p. 229.) "Recognizing a donor's property rights would prevent unjust enrichment by giving monetary rewards to the donor and researcher proportionate to the value of their respective contributions. Biotechnology depends upon the contributions of both patients and researchers. If not for the patient's contribution of cells with unique attributes, the medical value of the bioengineered cells would be negligible. But for the physician's contribution of knowledge and skill in developing the cell product, the commercial value of the patient's cells would also be negligible. Failing to compensate the patient unjustly enriches the researcher because only the researcher's contribution is recognized." (*Id.* at p. 230.) In short, as the Court of Appeal succinctly put it, "If this science has become science for profit, then we fail to see any justification for excluding the patient from participation in those profits."

5.

The majority's second reason for declining to extend the conversion cause of action to the present context is that "the Legislature should make that decision." (Maj. opn., *ante*, p. —— [typed maj. opn. p. 48].) I do not doubt that the Legislature is competent to act on this topic. The fact that the Legislature may intervene if and when it chooses, however, does not in the meanwhile relieve the courts of their duty of enforcing—or if need be, fashioning—an effective judicial remedy for the wrong here alleged. As I observed above (pt. 1, *ante*), if a conversion cause of action is otherwise an appropriate remedy on these facts we should not refrain from recog-

nizing it merely because the Legislature has not yet addressed the question. To do so would be to abdicate pro tanto our responsibility over a body of law—torts—that is particularly a creature of the common law. And such reluctance to act would be especially unfortunate at the present time, when the rapid expansion of biotechnological science and industry makes resolution of these issues an increasingly pressing need.

The inference I draw from the current statutory regulation of human biological materials, moreover, is the opposite of that drawn by the majority. By selective quotation of the statutes (maj. opn., *ante*, p. p. —— [typed maj. opn. p. 28], fns. 22 & 23) the majority seem to suggest that human organs and blood cannot legally be sold on the open market—thereby implying that if the Legislature were to act here it would impose a similar ban on monetary compensation for the use of human tissue in biotechnological research and development. But if that is the argument, the premise is unsound: contrary to popular misconception, it is not true that human organs and blood cannot legally be sold.

As to organs, the majority rely on the Uniform Anatomical Gift Act (Health & Saf. Code, § 7150 et seq., hereafter the UAGA) for the proposition that a competent adult may make a post mortem gift of any part of his body but may not receive "valuable consideration" for the transfer. But the prohibition of the UAGA against the sale of a body part is much more limited than the majority recognizes: by its terms (Health & Saf. Code, § 7155, subd. (a)) the prohibition applies only to sales for "transplantation" or "therapy."[22] Yet a different section of the UAGA authorizes the transfer and receipt of body parts for such additional purposes as "medical or dental education, research, or advancement of medical or

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[22] It also applies to the special case of sales for "reconditioning," which refers to pacemakers. (See, e.g., Health & Saf. Code, § 7153, subd. (a)(4).)

dental science." (Health & Saf. Code, § 7153, subd. (a)(1).) No section of the UAGA prohibits anyone from selling body parts for any of those additional purposes; by clear implication, therefore, such sales are legal.[23] Indeed, the fact that the UAGA prohibits *no* sales of organs other than sales for "transportation" or "therapy" raises a further implication that it is also legal for anyone to sell human tissue to a biotechnology company for research and development purposes.

With respect to the sale of human blood the matter is much simpler: there is in fact no prohibition against such sales. The majority rely (maj. opn., *Ante*, p. — [typed maj. opn. p. 28], fn. 23) on Health and Safety Code section 1606, which provides in relevant part that the procurement and use of blood for transfusion "shall be construed to be, and is declared to be . . . the rendition of a service . . . and shall not be construed to be, and is declared not to be, a sale . . . ." There is less here, however, than meets the eye: the statute does *not* mean that a person cannot sell his blood or, by implication, that his blood is not his property. "While many jurisdictions have classified his transfer of blood or other human tissue as a service rather than a sale, this position does not conflict with the notion that human tissue is property." (Columbia Note, *supra*, 90 Colum.L.Rev. at p. 544, fn. 76.) The reason is plain: "No State or Federal statute prohibits the sale of blood, plasma, semen (or other replenishing tissues) if taken in nonvital amounts. Nevertheless, State laws

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[23] "By their terms . . . the statutes in question forbid only sales for transplantation and therapy. In light of the rather clear authorization for donation for research and education, one could conclude that sales for these non-therapeutic purposes are permitted. Scientists in practice have been buying and selling human tissues for research apparently without interference from these statutes." (Note, *"She's Got Bette Davis['s] Eyes": Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses* (1990) 90 Colum.L.Rev. 528, 544, fn. 75 (hereafter Columbia Note).)

usually characterize these paid transfers as the provision of services rather than the sale of a commodity. . . . [¶] The primary legal reason for characterizing these transactions as involving services rather than goods is to avoid liability for contaminated blood products under either general product liability principles or the [Uniform Commercial Code's] implied warranty provisions." (OTA Rep., *supra*, at p. 76, fn. omitted.) The courts have repeatedly recognized that the foregoing is the real purpose of this harmless legal fiction. (See, e.g., *Hyland Therapeutics* v. *Superior Court* (1985) 175 Cal.App.3d 509; *Cramer* v. *Queen of Angels Hosp.* (1976) 62 Cal.App.3d 812; *Shepard* v. *Alexian Brothers Hosp.* (1973) 33 Cal. App.3d 606.) Thus despite the statute relied on by the majority, it is perfectly legal in this state for a person to sell his blood for transfusion or for any other purpose —indeed, such sales are commonplace, particularly in the market for plasma. (See OTA Rep., *supra*, at p. 121.)

It follows that the statutes regulating the transfers of human organs and blood do not support the majority's refusal to recognize a conversion cause of action for commercial exploitation of human blood cells without consent. On the contrary, because such statutes treat both organs and blood as property that can legally be sold in a variety of circumstances, they impliedly support Moore's contention that his blood cells are likewise property for which he can and should receive compensation, and hence are protected by the law of conversion.

6.

The majority's final reason for refusing to recognize a conversion cause of action on these facts is that "there is no pressing need" to do so because the complaint also states another cause of action that is assertedly adequate to the task (maj. opn., *ante*, p. — [typed maj. opn. p. 49]); that cause of action is "the breach of a fiduciary duty to disclose facts material to the patient's consent or,

alternatively, . . . the performance of medical procedures without first having obtained the patient's informed consent" (*id.* at p. 10).[24] Although last, this reason is not the majority's least; in fact, it underlies much of the opinion's discussion of the conversion cause of action, recurring like a leitmotiv throughout that discussion.

The majority hold that a physician who intends to treat a patient in which he has either a research interest or an economic interest is under a fiduciary duty to disclose such interest to the patient before treatment; that his failure to do so may give rise to a nondisclosure cause of action; and that the complaint herein states such a cause of action at least against defendant Golde. I agree with that holding as far as it goes.

I disagree, however, with the majority's further conclusion that in the present context a nondisclosure cause of action is an adequate—in fact, a superior—substitute for a conversion cause of action. In my view the nondisclosure cause of action falls short on at least three grounds.

First, the majority reason that "enforcement of physicians' disclosure obligations" will ensure patients' freedom of choice. (Maj. opn., *ante*, p. — [typed maj. opn. p. 49].) The majority do not spell out how those obligations will be "enforced"; but because they arise from judicial decision (the majority opinion herein) rather than from legislative or administrative enactment, we may infer that the obligations will primarily be enforced by the traditional judicial remedy of an action for damages for their breach. Thus the majority's theory apparently is that the threat of such an action will have a prophylactic effect: it will give physician-researchers incentive to disclose any conflicts of interest before treatment, and will thereby

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[24] In the interest of brevity I shall refer hereafter to this compound cause of action simply as the "nondisclosure cause of action."

protect their patients' right to make an informed decision about what may be done with their body parts.

The remedy is largely illusory. "[A]n action based on the physician's failure to disclose material information sounds in negligence. As a practical matter, however, it may be difficult to recover on this kind of negligence theory because the patient must prove a *causal connection* between his or her injury and the physician's failure to inform." (Martin & Lagod, *Biotechnology and the Commercial Use of Human Cells: Toward an Organic View of Life and Technology* (1989) 5 Santa Clara Computer & High Tech L.J. 211, 222, fn. omitted, italics added.) There are two barriers to recovery. First, "the patient much show that if he or she had been informed of all pertinent information, he or she would have declined to consent to the procedure in question." (*Ibid.*) As we explained in the seminal case of *Cobbs* v. *Grant* (1972) 8 Cal. 3d 229, 245, "There must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. Such a causal connection arises only if it is established that had revelation been made consent to treatment would not have been given."[25]

The second barrier to recovery is still higher, and is erected on the first: it is not even enough for the plaintiff to prove that he personally would have refused consent to the proposed treatment if he had been fully informed; he must also prove that in the same circumstances *no reasonably prudent person* would have given such consent. The purpose of this "objective" standard is evident: "Since

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[25] This is also the rule elsewhere: a leading case recognized that "as in malpractice actions generally, there must be a causal relationship between the physician's failure to adequately divulge and damage to the patient. [¶] A causal connection exists when, but only when, disclosure of significant risks incidental to treatment would have resulted in a decision against it." (*Canterbury* v. *Spence* (D.C. Cir. 1972) 464 F.2d 772, 790, fns. omitted; accord, 2 Louisell & Williams, Medical Malpractice (1989) Informed Consent, ¶ 22.14, pp. 22-49 to 22-50.)

at the time of trial the uncommunicated hazard has materialized, it woud be surprising if the patient-plaintiff did not claim that had he been informed of the dangers he would have declined treatment. Subjectively he may believe so, with the 20/20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment. Thus an objective test is preferable: i.e., what would a prudent person in the patient's position have decided if adequately informed of all significant perils." (*Cobbs* v. *Grant*, *supra*, 8 Cal.3d 229, 245.)[26]

Even in an ordinary *Cobbs*-type action it may be difficult for a plaintiff to prove that no reasonably prudent person would have consented to the proposed treatment if the doctor had disclosed the particular risk of physical harm that ultimately caused the injury. (See, e.g., *Morganroth* v. *Pacific Medical Center, Inc.* (1976) 54 Cal. App.3d 521, 534 [affirming nonsuit in *Cobbs*-type action on ground, inter alia, of lack of proof that plaintiff would have refused coronary arteriogram if he had been told of risk of stroke].) This is because in many cases the potential benefits of the treatment to the plaintiff clearly outweigh the undisclosed risk of harm. But that imbalance will be even greater in the kind of nondisclosure action that the majority now contemplate: here we deal not with a risk of physical injuries such as a stroke, but with the possibility that the doctor might later use

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[26] Again the rule is general: "the vast majority of jurisdictions that have considered the issue apply an objective standard," focusing "on what a *reasonable* patient in the plaintiff's position would have done if adequately informed." (2 Louisell & Williams, *op. cit. supra*, ¶ 22.14, pp. 22-50 to 22-51).

The rule is also incorporated in a standard jury instruction: failure to disclose before obtaining consent results in liability "if a reasonably prudent person in the patient's position would not have consented to the [treatment] [operation] if he or she had been adequately informed of all the significant perils." (BAJI No. 6.11 (7th ed. 1986 bound vol.).)

some of the patient's cast-off tissue for scientific research or the development of commercial products. Few if any judges or juries are likely to believe that disclosure of such a possibility of research or development would dissuade a reasonably prudent person from consenting to the treatment. For example, in the case at bar no trier of fact is likely to believe that if defendants had disclosed their plans for using Moore's cells, no reasonably prudent person in Moore's position—i.e., a leukemia patient suffering from a grossly enlarged spleen—would have consented to the routine operation that saved or at least prolonged his life. Here, as in *Morganroth* (*ibid.*), a motion for nonsuit for failure to prove proximate cause will end the matter. In this context, accordingly, the threat of suit on a nondisclosure cause of action is largely a paper tiger.

The second reason why the nondisclosure cause of action is inadequate for the task that the majority assign to it is that it fails to solve half the problem before us: it gives the patient only the right to *refuse* consent, i.e., the right to prohibit the commercialization of his tissue; it does not give him the right to *grant* consent to that commercialization on the condition that he share in its proceeds. "Even though good reasons exist to support informed consent with tissue commercialization, a disclosure requirement is only the first step toward full recognition of a patient's right to participate fully. Informed consent to commercialization, absent a right to share in the profits from such commercial development, would only give patients a veto over their own exploitation. But recognition that the patient[s] [have] an ownership interest in their own tissues would give patients an affirmative right of participation. Then patients would be able to assume the role of equal partners with their physicians in commercial biotechnology research." (Howard, *supra*, 44 Food Drug Cosm. L.J. at p. 344.)

Reversing the words of the old song, the nondisclosure cause of action thus accentuates the negative and elimi-

nates the positive: the patient can say no, but he cannot say yes and expect to share in the proceeds of his contribution. Yet as explained above (pt. 4, *ante*), there are sound reasons of ethics and equity to recognize the patient's right to participate in such benefits. The nondisclosure cause of action does not protect that right; to that extent, it is therefore not an adequate substitute for the conversion remedy, which does protect the right.

Third, the nondisclosure cause of action fails to reach a major class of potential defendants: all those who are outside the strict physician-patient relationship with the plaintiff. Thus the majority concede that here only defendant Golde, the treating physician, can be directly liable to Moore on a nondisclosure cause of action: "The Regents, Quan, Genetics Institute, and Sandoz are not physcians. In contrast to Golde, none of these defendants stood in a fiduciary relationship with Moore or had the duty to obtain Moore's informed consent to medical procedures." (Maj. opn., *ante*, p. — [typed maj. opn. p. 20].) As to these defendants, the majority can offer Moore only a slim hope of recovery: if they are to be liable on a nondisclosure cause of action, say the majority, "it can only be on account of Golde's acts and on the basis of a recognized theory of secondary liability, such as respondeat superior." (*Ibid.*) Although the majority decline to decide the question whether the secondary-liability allegations of the complaint are sufficient, they strongly imply disapproval of those allegations.[27]

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[27] Quoting a portion of the agency allegations stated in paragraph 4 of the third amended complaint, the majority criticize them as "egregious examples of generic boilerplate." (Maj. opn., *ante*, p. —— [typed maj. opn. p. 21], fn. 12.) But if being "boilerplate" were a valid objection, few pleadings would pass muster in this age of Judicial Council compulsory forms, widely used model form books, and drafting programs on law office computers. It is true that the quoted language of the complaint alleges the fact of agency in general terms, but that is the proper form of such an allegation. (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 868,

And the majority further note that the trial court has already ruled insufficient the allegations of agency as to the corporate defendants. (Maj. opn., *ante*, p. — [typed maj. opn. p. 21].)

To the extent that a plaintiff such as Moore is unable to plead or prove a satisfactory theory of secondary liability, the nondisclosure cause of action will thus be inadequate to reach a number of parties to the commercial exploitation of his tissue. Such parties include, for example, any physician-researcher who is not personally treating the patient, any other researcher who is not a physician, any employer of the foregoing (or even of the treating physician), and any person or corporation thereafter participating in the commercial exploitation of the tissue. Yet some or all of those parties may well have participated more in, and profited from from, such exploitation than the particular physician with whom the plaintiff happened to have a formal doctor-patient relationship at the time.

In sum, the nondisclosure cause of action (1) is unlikely to be successful in most cases, (2) fails to protect patients' rights to share in the proceeds of the commercial exploitation of their tissue, and (3) may allow the true exploiters to escape liability. It is thus not an adequate substitute, in my view, for the conversion cause of action.

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pp. 309-310). It is also true that the complaint alleges a variety of different agency relationships that could support secondary liability ("agency, employment, partnership and joint venture"); but such allegations are a modest form of alternative pleading that should be permitted when as here the plaintiff is uncertain as to which one or more of these several forms of agency will be proved at trial. (4 Witkin, *op. cit. supra*, Pleading, § 355, at p. 410.)

In addition, the majority omit to mention paragraph 5 of the third amended complaint, which in my view contains sufficient allegations to the effect that Golde was an agent of the corporate defendants and that such defendants ratified his acts vis-a-vis Moore.

7.

My respect for this court as an institution compels me to make one last point: I dissociate myself completely from the amateur biology lecture that the majority impose on us throughout their opinion. (Maj. opn., *ante*, fns. 2, 29, 30, 33 and 35, and text at p. — [typed maj. opn. pp. 31-32].) For several reasons, the inclusion of most of that material in an opinion of this court is improper.

First, with the exception of defendants' patent, none of the material in question is part of the record on appeal as defined by the California Rules of Court. Because this appeal is taken from a judgment of dismissal entered after the sustaining of general and special demurrers, there is virtually no record other than the pleadings. The case has never been tried, and hence there is no evidence whatever on the obscure medical topics on which the majority presume to instruct us. Instead, all the documents that the majority rely on for their medical explanations appear in an appendix to defendant Golde's opening brief on the merits. Such an appendix, however, is no more a part of the *record* than the brief itself, because the record comprises only the materials before the trial court when it made its ruling. (See Cal. Rules of Court, rules 4 through 5.2.) Nor could Golde have moved to augment the record to include any of these documents, because none was "part of the original superior court file," a prerequisite to such augmentation. (Cal. Rules of Court, rule 12(a).) "As a general rule, documents not before the trial court cannot be included as a part of the record on appeal." (Doers v. Golden Gate Bridge etc. Dist. (1979) (23 Cal.3d 180, 184, fn. 1.)

Second, most of these documents bear solely or primarily on the majority's discussion of whether Moore's "genetic material" was or was not "unique" (see maj. opn., *ante*, p. —— [typed maj. opn. pp. 31-32]), but that entire discussion is legally irrelevant to the present ap-

peal. As Justice Broussard correctly observes in his separate opinion, "the question of uniqueness has no proper bearing on plaintiff's basic right to maintain a conversion action; ordinary property, as well as unique property, is, of course, protected against conversion." (Conc. and dis. opn. of Broussard, J., *ante*, p. —— [typed conc. and dis. opn. of Broussard, J., p. 16].)

Third, this nonissue is also a noncontention. The majority claim that "Moore relies . . . primarily" on an analogy to certain right-of-privacy decisions (maj. opn., *ante*, p. —— [typed maj. opn. p. 29]), but this is not accurate. Under our rules, as an appellate practice generally, the parties to an appeal are confined to the contentions raised in their briefs (see Cal. Rules of Court, rule 29.3). In his brief on the merits in this court Moore does not even cite, less still "rely primarily," on the right-of-privacy decisions discussed by the majority, nor does he draw any analogy to the rule of those decisions. It is true that in the course of oral argument before this court, counsel for Moore briefly paraphrased the analogy argument that the majority now attribute to him; but a party may not, of course, raise a new contention for the first time in oral argument.

Fourth, much of the material that the majority rely on in this regard is written in highly technical scientific jargon by and for specialists in the field of contemporary molecular biology. See, e.g., articles cited in maj. opn., *ante*, fn. 30, 2d par., & fn. 35, 2d par.) As far as I know, no member of this court is trained as a molecular biologist, or even as a physician; without expert testimony in the record, therefore, the majority are not competent to explain these arcane points of medical science any more than a doctor would be competent to explain esoteric questions of the law of negotiable instruments or federal income taxation, or the rule against perpetuities.[28]

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[28] Contrary to the majority's implication (maj. opn., *ante*, fn. 35, 3d par.) there is nothing inconsistent herewith in three opinions

In attempting to expound this science the majority run two serious risks. First, because they have no background in molecular biology the majority may simply misunderstand what they are reading, much as a layman might misunderstand a highly technical article in a professional legal journal. Indeed, I suggest the majority have already fallen into this very trap, since some of their explana-

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that I authored for the court on the admissibility of certain kinds of testimony. Thus in both *People* v. *Shirley* (1982) 31 Cal.3d 18, and *People* v. *Guerra* (1984) 37 Cal.3d 385, we held inadmissible the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue. Although in so doing we had occasion to refer to professional literature in the field of psychology, both cases are distinguishable from the case at bar on several grounds. First, they came to us on records reflecing full trials in which expert witnesses testified at length on the point at issue. Second, we referred to the professional literature not for the truth of the matter asserted but simply to show that it "fully supports the testimony of [the expert witness]" and establishes that the challenged testimony is not generally accepted as reliable by the relevant scientific community and hence is inadmissible under the rule of *People* v. *Kelly* (1976) 17 Cal.3d 24, and *Frye* v. *United States* (D.C. Cir. 1923) 293 F. 1013. (*People* v. *Shirley, supra*, 31 Cal.3d 18, 66.) As we explained in *Shirley*, in such circumstances "our duty is *not* to decide whether hypnotically induced recall of witnesses is reliable as a matter of 'scientific fact,' but simply whether it is generally accepted as reliable by the relevant scientific community." (*Id.* at p. 55.) Third, the articles we cited discussed matters of human psychology that were much more accessible to laypersons than the highly technical medical research reports relied on here by the majority.

In the other case of this type (*People* v. *McDonald* (1984) 37 Cal.3d 351) we held admissible expert testimony on psychological factors shown by the evidence that may affect the accuracy of an eyewitness identification. Although we cited certain psychological literature, the case is likewise distinguishable. It, too, came to us after a full trial, on a record that included a detailed explanation by the expert witness of his proposed testimony (*id.* at pp. 361-362). Again we referred to the professional articles primarily as support for that expert testimony (*id.* at pp. 368-369). And again the contents of those articles were much more accessible to laypersons than the medical research reports relied on by the majority.

tions appear either mistaken, confused, or incomplete (e.g., maj. opn., *ante*, fn. 29).

The second risk is that of omission. The majority have access to most of the legal literature published in this country; but even if the majority could understand the medical literature, as a practical matter they have access to virtually none of it. This is demonstrated by the fact that every one of the medical articles now relied on by the majority came into their possession as reprints furnished to this court by one of the parties to this lawsuit —obviously not an unbiased source. Because the majority are thus not equipped to independently research the medical points they seek to make, they risk presenting only one side of the story; it may well be that other researchers have reached different or even contrary results, reported in publications that defendants, acting in self-interest, have not furnished to the court. I leave it to professionals in molecular biology to say whether the majority's explanations on this topic are both correct and balanced. Because I fear they may be neither, I cannot subscribe to any of them.

I would affirm the decision of the Court of Appeal to direct the trial court to overrule the demurrers to the cause of action for conversion.

MOSK, J.

WE CONCUR:

MOORE v. REGENTS, U.C.
S006987

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TRIAL COURT & NO.:

Los Angeles County Superior
Court No. C513755

TRIAL JUDGE:

The Honorable John L. Cole

The Honorable Warren Deering

The information provided here is not intended to reflect that which will appear in the official reports.

APPENDIX B

ORDER DENYING REHEARING
B021195 No. S006987

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

JOHN MOORE,

Appellant

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

Respondents

Respondent's petition for rehearing DENIED.

Mosk, J. and Broussard, J. are of the opinion the petition should be granted.

/s/ Lucas
Chief Justice

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Supreme Court No. S 006987
Appellate No. B 021195

JOHN MOORE,
Plaintiff and Respondent,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC.; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICALS CORPORATION aka SANDOZ, INC., and DOES 1 through 1000, inclusive,
Defendants and Petitioners.

ANSWER BRIEF ON THE MERITS OF RESPONDENT JOHN MOORE

LAW OFFICES OF SANFORD M. GAGE
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* * * *

F. THE OTHER CAUSES OF ACTION SET FORTH IN THE COMPLAINT ARE SUPPORTED BY THE FACTS ALLEGED.

While the Court of Appeal decision focused primarily on the cause of action for conversion, it is clear from the facts described in the Complaint that the remaining causes of action, such as those for failure to obtain informed consent, breach of fiduciary duty, fraud and deceit, and unjust enrichment, are also properly pled in this case. As Respondent set forth in his Opening and Reply Briefs before the Court of Appeal, those causes of action are not dependent upon either a finding of a property interest nor the finding of a conversion, and in fact are even more deeply rooted in the fundamental societal values and the decisional and statutory law of California.

Indeed, the actions of state governmental entity or employee Petitioners the Regents, Golde and Quan in appropriating Plaintiff's valuable cell line and genetic material without his knowledge or consent, constitutes a deprivation of a property interest by a public entity without due process of law in violation of the Constitution of the State of California, Article 1, § 7, and the Due Process Clause of the United States Constitution, Amendment V, as applied to the States under Amendment XIV.

* * * *

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Supreme Court No. S 006087
Appellate No. B 021195

JOHN MOORE,
Plaintiff and Respondent,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC.; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICALS CORPORATION aka SANDOZ, INC. and DOES 1 through 1000, inclusive,
Defendants and Petitioners.

PETITION FOR REHEARING OF
RESPONDENT JOHN MOORE
[Filed Jul. 24, 1990]

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* * * *

VIII. THE MAJORITY OPINION JUDICIALLY CONDONES TAKING OF PROPERTY WITHOUT DUE PROCESS AND JUST COMPENSATION IN VIOLATION OF THE CALIFORNIA AND U.S. CONSTITUTIONS

In listing Fundamental Civil Rights, Witkin; Summary of California Law (9th Ed) at p. 634-5 states: "The following are significant rights and liberties held to be fundamental and therefore within the protection of the Due Process clause, . . ." "(6) The right to acquire, enjoy, own and dispose of property. (citations omitted)."

As early as 1891, the U.S. Supreme Court held in *Union Pacific Railway Co. v. Botsford* (1891) 141 U.S. 250, 251 that:

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to *the possession and control of his own person*, free from all restraints or interference of others, unless by clear or unquestionable authority of law." (Emphasis added).

Clearly, the U.S. Supreme Court was recognizing an inherent property interest that each of us have in his or her own person.

As pointed out in Petitioner's Answer Brief, the actions of state governmental entities or employees (Petitioners GOLDE, QUAN and THE REGENTS) in appropriating Petitioner's valuable cell line and genetic material specifically alleged to be his property, without his knowledge or consent, and in violation of their fiduciary duty of full disclosure to him, clearly constituted a deprivation of a property interest by a public entity of the State without due process of law in violation of the Constitution of the State of California, Article 1, Section 7, and the Due Process Clause of the United States Constitution Amendment V, as applied to the States through Amendment XIV. (Respondents Answer Brief page 8).

The facts alleged in the complaint under review clearly describe a "taking" by a governmental entity and its employees, a "taking" which, the majority opinion holds, was perpetrated under circumstances supporting causes of action for lack of informed consent and breach of fiduciary duty of disclosure by the government employee (Petitioner GOLDE). That Respondent MOORE was denied due process in the taking of his cells and deprived any compensation for the taking of his property interest in those cells is also set forth with particularity.

However, the majority's refusal to affirm the cause of action for conversion based on these allegations creates a situation in this jurisdiction whereby state entities can take such property interests from individuals without fear of liability for conversion. In effect, the majority opinion judicially condones such taking without due process or just compensation, which is impermissible under both the California and U.S. Constitutions.

Note that this is precisely what the brief of the amicus curiae for the biotechnology industry argued. In their reply brief, they argued that the State had the inherent right to take respondent's property under its power of eminent domain! Of course, there has been no showing of the predicate requirement of public necessity, but the condemnation of Respondent's property carried out by the State in this case requires just compensation be paid.

* * * *

APPENDIX E

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C 513755

JOHN MOORE,

Plaintiff,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC., SANDOZ, LTD., SANDOZ UNITED STATES, INC., SANDOZ PHARMACEUTICAL CORPORATION aka SANDOZ, INC. and DOES 1 through 1000, inclusive,

Defendants.

THIRD AMENDED COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF

FIRST CAUSE OF ACTION FOR CONVERSION AGAINST ALL DEFENDANTS

Plaintiff JOHN MOORE alleges as follows:

1. Plaintiff possesses a unique type of blood and blood components with cells possessing unique properties, unique genetic materials, and producing unique products which in and of themselves, and when isolated, cloned or cultured through biomedical, biogenetic, and other means,

have the potential for providing, and have provided, significant breakthroughs in the research and development concerning blood cancers, blood disorders, virally-related diseases, diseases of the immune system, and other conditions or disorders.

2. As a result, plaintiff's unique blood and blood components have both substantial present and future potential value in the commercial research and development of substances, materials, and processes which have considerable therapeutic and financial value and potential, and which have provided and will continue to provide significant financial and competitive advantage to those individuals or entities who have access to, or exercise control over plaintiff's unique blood and blood components. Plaintiff's blood, blood components, blood factors, by-products, bodily tissues, cells, cell-lines, serum, lymphokines, genetic material, genetic sequences, conditioned medium, spleen, sperm, bone marrow aspirate, and the like, as well as the products and components derived therefrom, are hereinafter collectively referred to as plaintiff's "Blood and Bodily Substances."

3. Defendants, the Regents of the University of California, Does 1 through 100, and each of them, are governmental entities which own and operate the University of California at Los Angeles Medical Center, Does 101 through 200, hospitals holding themselves out to provide care, treatment and research for patients with facilities located at Los Angeles, California, and each of them, and employed defendants, David W. Golde, M.D., a medical doctor, licensed to practice in the State of California, and Shirlty W. [sic] Quan, and Does 201 through 300, and defendants, Genetics Institute, Inc.; Sandoz, Ltd.; Sandoz United States, Inc.; Sandoz Pharmaceutical Corporation aka Sandoz, Inc.; Does 301 through 400, and each of them, are genetic, pharmaceutical, biomedical and bioengineering firms, their employees, agents, joint venturers, and other individuals and entities, doctors, scien-

tists, technicians and researchers in the fields of biogenetics, biomedical, and genetic engineering and other sciences whose precise names and capacities are unknown to plaintiff at this time; defendants Does 401 through 1000, and each of them, are other entities and individuals who are liable to plaintiff in some manner, but their precise names, capacities and activities cannot be ascertained at this time and leave of Court will be sought to insert the true names, capacities and activities of all defendants, according to proof.

4. That the term "defendants" hereinafter refers to each and all of the defendants, whether specifically named or designated as a Doe, and that each of the defendants was the agent, joint venturer and employee of each of the other remaining defendants, and is jointly liable for the acts of every other defendant and in doing the things hereinafter alleged, each was acting within the course and scope of said agency, employment, partnership and joint venture with the advance knowledge, acquiescence or subsequent ratification of each and every remaining defendant, and that each defendant joined together with every other defendant and conspired to do and carry out all of the acts herein alleged and that each defendant had a fiduciary duty to the plaintiff, and each acted in concert with every other defendant in violating their duties to plaintiff.

5. Plaintiff alleges that, at all times relevant herein, Defendant Golde, both in his capacity as a physician and in his separate capacity as a researcher engaged in commercial activities, was an employee, officer, and/or agent of Defendant, The Regents of the University of California; and at all times after on or about 1980, continuing through the present, Defendant Golde, both in his capacity as a physician in the physician-patient relationship with plaintiff, and as a researcher and investor engaged in the commercial exploitation of the products extracted from plaintiff, was an employee, officer, investor, advisor,

consultant and or agent of Defendants, Genetics Institute, Inc., Sandoz, Ltd., Sandoz United States, Inc., Sandoz Pharmaceutical Corporation aka Sandoz Inc. In these applicable capacities, Defendant Golde acted with the knowledge and support of Defendant, The Regents of the University of California and or Defendants, Genetics Institute, Inc., Sandoz Ltd., Sandoz United States, Inc., Sandoz Pharmaceutical Corporation aka Sandoz Inc., which knew or should have known of the physician-patient relationship with plaintiff, the means by which Defendant Golde had obtained access to, and continued to have access to, plaintiff's Blood and Bodily Substances, and through their actions and compensation of Defendant Golde, ratified or approved Defendant Golde's activities in this regard.

6. On or about September, 1976, plaintiff, who was then living in Alaska, was diagnosed as having a condition referred to as "hairy-cell leukemia".

7. Plaintiff sought an additional opinion concerning his condition, and travelled to Los Angeles, California to visit the facilities of the UCLA Medical Center, where he was seen by Defendant Golde and other employees of Defendant, The Regents of the University of California, on or about October, 1976.

8. Defendants, based upon their experience and familiarity with developments in scientific fields relevant to such matters, were aware that certain blood products and blood components were of great value in a number of commercial and scientific efforts, and that a steady and abundant natural source of these substances in a human being would be highly desirable.

9. In addition, defendants, were aware that certain characteristics and properties of the blood and blood components of certain rare patients could prove to be highly useful in defendants' efforts to locate, isolate and cultivate large quantities of these valuable substances.

10. Defendants were also aware that direct and exclusive access to such a patient would provide them with a steady and natural source of these unique living substances and properties, and would provide defendants with competitive, commercial, and scientific advantages.

11. The defendants saw and examined plaintiff on or about October 5, 1976 and then hospitalized plaintiff for a number of days and withdrew extensive amounts of blood, bone marrow aspirate, and other bodily substances from plaintiff.

12. Defendants, and each of them, in the course of their contact with plaintiff, confirmed and communicated to plaintiff the diagnosis of "hairy-cell leukemia" which they claimed required further hospital, medical, surgical and related health care and treatment.

13. On or about October 8, 1976, defendants discharged plaintiff and informed him that he was to be readmitted after a period of approximately two weeks to their medical facility, at which time his spleen would be surgically removed by the defendants.

14. Prior to the surgical removal of plaintiff's spleen, Defendant David W. Golde, M.D., Defendant Shirley G. Quan, and other defendants, without advising plaintiff or obtaining his consent, formed the intent and made arrangements to obtain portions of his spleen following its removal from plaintiff in connection with their desire to have regular and continuous access to, and possession of, plaintiff's unique and rare Blood and Bodily Substances.

15. Plaintiff was never informed by the defendants of the research and commercial value of his Blood and Bodily Substances, including his spleen, prior to its surgical removal, nor was he ever informed of defendants' prior formed intent to obtain from the operating room or the Surgical Pathology Department immediately after said surgery a portion or portions of his spleen and to remove said portion or portions to an entirely separate research

unit where defendants, without plaintiff's knowledge or consent, would store, study, culture, grow and otherwise use them to establish cell-lines, cultures, conditioned media and other by-products having the aforementioned valuable, unique and rare characteristics possessed by his Blood and Bodily Substances, all of which activities did not have, and were not intended to have, any relation to plaintiff's medical and health care.

16. On or about October 16, 1976, plaintiff was readmitted to defendants' Medical Center, and fully believed, based on representations made to him by Defendant Golde and other of the defendants regarding his disease and the purpose of his hospitalization, that he had reason to fear for his life, and that the proposed splenectomy operation being recommended by Defendant Golde and the defendants was necessary to slow down the progress of his disease.

17. On or about October 18, 1976, Defendant Golde provided written instructions to members of the research staff of Defendant, The Regents of the University of California, informing them of the unique characteristics of plaintiff's condition and Blood and Bodily Substances, and instructing them to study and characterize the nature of his unique cells, Blood and Bodily Substances, utilizing a portion of plaintiff's spleen. At no time did Defendant Golde, nor Defendant Quan, nor any of the other defendants or researchers involved in this action ever inform plaintiff of their intentions in this regard, nor did they request nor did they ever receive any permission or consent from plaintiff to perform these activities on plaintiff's spleen tissue or the unique Blood and Bodily Substances contained therein.

18. On or about October 19, 1976, Defendant Golde visited plaintiff while hospitalized at UCLA Medical Center, and without discussing in any way or informing plaintiff in any fashion of defendants' plans and intended activities regarding plaintiff's spleen and Blood and

Bodily Substances, Defendant Golde noted in plaintiff's medical record his desire to have a portion of plaintiff's fresh spleen placed in a sterile container and removed from the operating room for his independent research purposes.

19. Prior to surgical removal of his spleen, on or about October 19, 1976, plaintiff signed a written consent form authorizing Dr. Kenneth Ramming, M.D. and Dr. Jack A. Roth, M.D., surgeons at the UCLA Medical Center, to perform a splenectomy upon plaintiff. At no time was plaintiff's consent to any other usage by defendants of his spleen or removed Blood and Bodily Substances, including usage in defendants' intended research and commercial activities thereon, either mentioned, discussed with, sought or obtained from plaintiff by defendants.

20. When plaintiff consented to the removal of his spleen, he had never been informed by the defendants, nor did he have available to him any reasonable basis for discovering, nor could he have known or discovered, that his Blood and Bodily Substances, including his spleen, had unique and rare properties and characteristics that were of value in the research and commercial activities in which the defandants, without his knowledge, intended to engage in [sic] by utilizing and exploiting them.

21. Plaintiff gave his limited written consent to the removal of his spleen based solely upon the defendants' representations that such removal was necessary for his care, treatment and diagnosis.

22. In connection with purportedly providing said hospital, medical, surgical and related health care, diagnosis and treatment to plaintiff, certain defendants, specifically surgeons, physicians and other health care personnel of the University of California at Los Angeles Medical Center, surgically removed plaintiff's Blood and Bodily Substances, including his spleen, on or about October 20, 1976.

23. Immediately following the surgical removal of plaintiff's spleen, defendant David W. Golde, M.D., defendant Shirley G. Quan, and other defendants carried out the intent they had formed and the arrangements they had made prior to plaintiff's surgery and obtained from the operating room or the Surgical Pathology Department of UCLA Medical Center a portion or portions of plaintiff's spleen, and caused that portion or portions to be removed from there and taken to facilities of a separate and distinct research unit of the UCLA School of Medicine, where it was stored, studied, cultured, grown and otherwise used to establish cell-lines, conditioned media and other by-products having the aforementioned unique and rare characteristics possessed by plaintiff's Blood and Bodily Substances in order to further the research and commercial activities of the defendants which were unrelated to plaintiff's medical and health care.

24. Plaintiff is informed and believes and thereon alleges that after its removal, no portion or portions of plaintiff's spleen taken from the Surgical Pathology Department to separate research units by defendants, nor any of the cultures, cell-lines, conditioned media, factors, lymphokines, genetic material, genetic sequences, or other by-products thereof, whether developed, established or obtained by the defendants or others from plaintiff's Blood and Bodily Substances, including but not limited to his spleen, were ever used in any way in connection with his actual medical and health care, treatment or diagnosis.

25. At no time did plaintiff know, nor was there any reasonable basis on which he should or could have known, nor was he ever informed, that defendants, would conduct research and commercial activities on his spleen which were designed and intended to further defendants' independent research and commercial purposes, rather than to assist the medical and health care and treatment actually received by plaintiff.

26. Had plaintiff known of the above facts and defendants' true research and commercial intentions and

plans in this regard, and the value of his Blood and Bodily Substances in those intentions and plans, he would not have submitted to the surgical removal and withdrawal of said Blood and Bodily Substances, including his spleen, for the purported purpose and under the guise of his medical and health care.

27. Had plaintiff known of the above facts and defendants' true research and commercial intentions and plans in this regard, and of the value of his Blood and Bodily Substances in those intentions and plans, plaintiff would have insisted on participating in the control of, and the decisions regarding, the use of said Blood and Bodily Substances in order to ensure that their valuable characteristics would be properly protected and preserved and made available to other research facilities and entities expert in such matters, rather than permit his Blood and Bodily Substances and their unique and valuable characteristics misappropriated by the defendants to be used solely for the benefit of defendants' independent research and commercial activities for their sole personal future economic benefit.

28. Had plaintiff known of the above facts and defendants' true research and commercial intentions and plans in this regard, and of the value of his Blood and Bodily Substances in those intentions and plans, plaintiff would have considered whether to avail himself of medical, surgical and health care services at other facilities and institutions, where his wishes in this regard would have been inquired into, respected, and carried out.

29. Had plaintiff known of the above facts and defendants' true research and commercial intentions and plans in this regard, and of the value of his Blood and Bodily Substances in those intentions and plans, plaintiff would have sought to participate in the economic and financial benefit defendants, and each of them, sought to receive, did receive and are likely to receive, as a result of their research and commercial activities and exploitation of

his Blood and Bodily Substances without his consent or knowledge, and in a manner not related to or required for his actual medical and health care, in an amount proportionate to the value of his contributive share.

30. At the direction of the defendants, and based upon the affirmative representations of the defendants to the plaintiff that such visits and activities were necessary and required for his health and well-being, and based upon the trust inherent in and by virtue of the physician-patient relationship which the defendants actively promoted with the plaintiff and upon which plaintiff relied, plaintiff periodically returned to the facilities of the defendants from on or about 1976 through on or about September, 1983. These visits included but are not limited to visits which occurred on or about November 8, 1976, November 22, 1976, November 29, 1976, April 18, 1977, March 20, 1978, April 10, 1979, December 29, 1980, September 3, 1981, February through March, 1982, April 11, 1983, and September 20, 1983, with a further visit contemplated to be scheduled for mid-1984.

31. These visits, and each of them, were for the purpose of enabling the defendants to withdraw and remove from plaintiff's body large and additional quantities of his Blood and Bodily Substances, including but not limited to blood, blood serum, skin, bone marrow aspirate, and sperm. The defendants expressly, affirmatively and impliedly represented to plaintiff that these withdrawals of his Blood and Bodily Substances were necessary and required for his health and well-being.

32. On each occasion of these visits, the defendants expressly and impliedly represented to the plaintiff that the withdrawal of his Blood and Bodily Substances was to be performed only by the defendants and at their direction at their facilities in Los Angeles. As a result, plaintiff was instructed to and did travel from his home in Seattle, Washington, to defendants' medical facilities at the UCLA Medical Center to facilitate their with-

drawal of his Blood and Bodily Substances on each of these occasions.

33. On each of these occasions, defendants failed to inform plaintiff of, and in fact concealed and affirmatively misrepresented to plaintiff, defendants' true independent research and commercial intent and activities which were wholly dependant upon defendants' continued access to plaintiff's unique Blood and Bodily Substances, and which were being carried out throughout this period without plaintiff's knowledge or consent solely to further defendants' research and commercial activities and to promote defendants' economic, financial, and competitive benefit, and were not intended to, and did not provide, any assistance in the actual medical and health care plaintiff received from the defendants.

34. The Blood and Bodily Substances removed or withdrawn from plaintiff during these numerous occasions on which plaintiff returned to the facilities of the defendants at their instruction were obtained by defendants for their use in culturing, growing and establishing cell-lines, cultures, conditioned medium, obtaining lymphokines, serum, isolating and duplicating unique genetic sequences, and other activities for which plaintiff's Blood and Bodily Substances were absolutely essential, and which were carried out by the defendants solely to further defendants' independent research and commercial activities and promote their economic, financial and competitive interests. Plaintiff is informed and believes and thereon alleges that none of these samples or specimens of his Blood and Bodily Substances removed on these occasions were used by the defendants to further or improve plaintiff's health and well-being, nor to assist in the actual medical and health care received by plaintiff.

35. Throughout plaintiff's care and treatment, and during each of these visits and withdrawals, and even when plaintiff inquired of the defendants as to the nature, purpose and progress of research, if any, that was

being performed by the defendants upon his disease or upon his Blood and Bodily Substances removed by the defendants, the defendants repeatedly replied only that the defendants were engaged in strictly academic and purely scientific medical research solely in connection with their efforts to determine the causes and potential cures of hairy-cell leukemia, and or plaintiff's individual condition, and which had as its sole aim and purpose the health and well-being of plaintiff, and perhaps research relating to the virus associated with his disease.

36. Throughout plaintiff's care and treatment, and during each of these visits and withdrawals, and even when plaintiff inquired as to whether there was any possible or potential commercial or financial value or significance of his Blood and Bodily Substances, or whether the defendants had discovered anything about plaintiff or his Blood and Bodily Substances which was or might be presently or in the future related to any scientific activity resulting in commercial or financial benefits of any kind and in any amount, the defendants repeatedly and affirmatively represented to plaintiff that there was no commercial or financial value to his Blood and Bodily Substances, that they had discovered nothing of any commercial or financial value in his Blood and Bodily Substances, and in fact actively discouraged such inquiries.

37. These representations and misrepresentations and concealments by the defendants continued throughout the period of time plaintiff was under the care and treatment, and have continued through the present.

38. Throughout the period of time of these visits, the defendants were aware that they were plaintiff's sole source of information about their activities regarding his Blood and Bodily Substances, and about his Blood and Bodily Substances themselves, and that plaintiff relied, and was entitled to rely upon, their statements and representations and denials regarding the true nature of their activities, and any commercial or financial potential

of his Blood or Bodily Substances known to the defendants.

39. In fact, throughout the period of time that plaintiff was under defendants' care and treatment and during each of these visits and withdrawals, the defendants were actively involved in a number of activities which they concealed from plaintiff, and which they knew plaintiff had and could have no knowledge or notice of, and which manifested their intent and plan to appropriate plaintiff's Blood and Bodily Substances to their own commercial and competitive purposes and schemes, and to benefit financially and competitively thereby, through their exploitation of plaintiff's unique Blood and Bodily Substances and the defendants' exclusive access to those Blood and Bodily Substances by virtue of their ongoing physician-patient relationship with plaintiff, and their representations to plaintiff that the number and quantity of their withdrawals of plaintiff's Blood and Bodily Substances (by which they were able to further such activities) were somehow necessary and required for plaintiff's health and well-being.

40. Defendants, were intimately and principally involved in each of these activities, and therefore were aware of the impact of each of these activities on plaintiff's Blood and Bodily Substances, the commercial and financial value thereof, plaintiff's rights and financial interests, and other issues which would have been highly relevant to plaintiff's continuing assent to their removal from him of his unique Blood and Bodily Substances.

41. On each of the visits described above, and throughout the relevant period, defendants never disclosed to plaintiff, nor did they ever respond to plaintiff's questions, with any information regarding any of these events or activities, nor the issues they raised which defendants were aware would directly affect plaintiff's personal and property rights in this regard. These activities of the defendants and events involving the defendants include, but are not limited to:

(a) The fact that the defendants, including but not limited to Defendants, Golde and Quan, as well as others employed by the Defendant, Regents, had extracted from plaintiff and otherwise established from his Blood and Bodily Substances a number of unique and valuable cell lines, including but not limited to those named by the defendants as the "Moore Cell-Line," the "Mo-cell Line," the "Mo-T Cell-Line," the "Mo-B Cell-Lines," the "J Cell-Lines," and others, and were actively and vigorously asserting to their colleagues around the world and to entities engaged in the awarding of research grants, and to the biogenetic and biomedical industry, the unique and valuable properties and capabilities of the cell lines and products thereof extracted from plaintiff, through proposals, articles, and presentations which enhanced the financial prospects, bargaining position, commercial activities and competitive position of the defendants.

(b) The fact that defendants throughout this period and without plaintiff's knowledge or consent, were actively engaged in the selective and controlled dissemination of samples of cell lines and products thereof extracted from plaintiff without his consent to a variety of commercial firms throughout the world engaged in biomedical and commercial biogenetic research, as well as to researchers who were known to act in a consulting capacity to other biogenetic and biomedical firms.

(c) The fact that defendants knew that while most human blood cell lines known as "human T-lymphocyte cell lines" do not elaborate lymphokines in scientifically, therapeutically, or commercially useful fashion, the Mo-cell Line extracted from plaintiff did and does elaborate such lymphokines in a unique way highly useful to such purposes, and that the unique manner in which the Mo-cell Line extracted from plaintiff elaborates these lymphokines greatly facilitated their purification and characterization, thereby making it possible, not only to obtain scientifically, therapeutically and commercially

useful quantities of said lymphokines, but also to facilitate the identification and copying of the unique genetic sequence possessed by plaintiff's Blood and Bodily Substances, so as to enable reserachers and commercial firms to produce large quantities of lymphokines for therapeutic, commercial and other uses.

(d) The fact that among the unique lymphokines produced by the Mo-cell Line extracted from plaintiff were Colony-stimulating Factor (CSF), which defendants knew had unusual potential therapeutic use, Erythroid Potentiating Activity (EPA), which defendants knew was useful in the production of human red blood cells in the treatment of chronic anemia, among other uses, and gamma interferon, including Interleukin II, of which defendants knew the Mo-cell Line extracted from plaintiff was an unusually potent producer, among other lymphokines.

(e) The fact that on or about May, 1979, because they were fully aware of the unique properties possessed by plaintiff's Blood and Bodily Substances, and of the important present and potential commercial applications made possible due to the Mo-cell Line, Defendant Golde and other defendants began to investigate and initiate the procedures by which an application for a patent on the cell line extracted from plaintiff could be obtained.

(f) On or about August, 1979, Defendant Golde submitted a "Report of Possibly Patentable Device, Process, Product, or Plant" to the Office of the Board of Patents of Defendant, The Regents of the University of California, in which he describes the Mo-cell Line as having been "derived from a patient with a T-cell variant of hairy-cell leukemia" and stating that the "cell line is unique because it produces a series of T-cell products referred to as lymphokines", including CSF, EPA, Interferon, and other proteins. Defendant Golde further stated in the report that "many of these factors may have considerable value as reagents and ultimately as thera-

peutic products," and that "to our knowledge, this is the only human cell line that produces these factors and, because it is an immortalized cell line, the factors can be produced in large quantity."

(g) Also pursuant to these efforts, Defendant Golde and others of the defendants composed an abstract of invention entitled "Invention: A Unique T-Lymphocyte Line and Products Derived Therefrom, UC File: 118-79 (Golde)" again stating that the Mo-cell Line had been "established" from "a patient with a T-cell variant of hairy-cell leukemia", and that the "cells have been shown to be capable of continuous culture for an indefinite period of time," producing "a wide variety of proteins." The abstract further stated that "the cells provide a continuous source of the above proteins" and that "in addition, . . . the cells provide either directly or indirectly, a source of the genes for the proteins of interest, which by conventional genetic engineering techniques, can be introduced into microorganisms for continuous large-scale production of the proteins."

(h) The fact that on or about February, 1980, Defendant Golde had personally initiated and engaged in extensive negotiations with a variety of private, biogenetic, for-profit firms, including Genentech, Inc., in an attempt to support efforts to commercially develop and scientifically investigate the polypeptides encoded by messenger RNA derived from the T-lymphoblast cell line extracted from plaintiff and composed of plaintiff's unique Blood and Bodily Substances.

(i) On or about April 23, 1980, Defendant Golde and Genentech, Inc., entered into a formal agreement under which Genentech, Inc. would collaborate with Defendant Golde in the scientific and commercial development of said lymphokines, which provided, inter alia, for regular payments of sums of money to Defendant Golde, the inclusion of Golde's name in various scientific papers which

were to be produced a result of the collaborative agreement, and other consideration.

(j) The fact that on September 11, 1980, Defendants Golde and The Regents were named as defendants in *Hoffman-La Roche Inc. vs. Golde, Koeffler, and The Regents of the University of California*, U.S.D.C., Northern District of California, Civil Action No. C 80-3601-AJZ, a lawsuit which centered on a controversy concerning ownership rights to a valuable cell line known as the KG-1 and/or KG-1A cell line, which had been extracted by Defendant Golde and his colleagues at Defendant Regent's facilities from a patient, and in which action Defendant Golde and Defendant Regents pled causes of action for conversion, misappropriation, and declaratory relief of said cell lines, claiming that a cell line was tangible property, and that Hoffman-La Roche, Inc. and Genentech, Inc. had, through misrepresentation and without defendants' consent, taken under false pretenses and converted those cell lines to their own commercial purposes. Issues raised by this case included the consent or lack of consent given by the human source of the cell lines, one Homer Cole (now deceased) to the extraction of his valuable cell line by Defendant, Golde or his colleagues. And raised in this case was the status of commercial, contractual licensing negotiations regarding one of the cell lines extracted from the instant Plaintiff, John Moore, the "Mo-T Cell-Line," with the commercial biogenetic firm Genentech and instant Defendant, Genetics Institute, among others.

(k) The fact that on January 30, 1981, Defendants Golde and Quan were listed as "inventors" on an application for a patent filed by Defendant Regents on the "Mo-T Cell-Line" (described in more detail infra), extracted from plaintiff, and that Defendants, Golde, Quan and The Regents were actively involved in various aspects of the application process, and that by virtue of an established policy of the Defendant Regents, the De-

fendants, Regents, Golde and Quan would share in any royalties or profits resulting from licensing or contracts arising out of said patent.

(l) The fact that on or about February, 1981, due in large part to the strained relations created by the KG-I litigation and controversy, Defendant Golde's contractual relationship with Genentech, Inc. was terminated.

(m) The fact that on or about late 1980 and early 1981, Defendant Golde had personally initiated and engaged in extensive negotiations with a variety of private, biogenetic, for-profit firms, including Defendant, Genetics Institute, Biogen and Does 301 through 400, by which Defendant Golde sought to obtain (and eventually did obtain) favorable terms for the commercial development, testing and marketing of the various cell lines and products thereof extracted from plaintiff without his consent or knowledge.

(n) The fact that during the ensuing and extensive negotiations, officers, supervisors, financial administrators, and other highly placed officials of Defendant Regents were aware of the commercial potential of the cell lines and by-products thereof extracted from plaintiff by defendants without plaintiff's consent, and a number of officers and personnel highly placed within Defendant Regents in defendant's administrative, legal, patent, and financial departments, exerted considerable effort to assist Defendant Golde in his negotiation because of the likelihood of present and future financial and commercial benefits which would accrue to the defendants as a result.

(o) The fact that, solely and as a direct result of Defendant Golde's negotiations with Genetics Institute regarding the cell lines and by-products thereof extracted from plaintiff without plaintiff's consent, and of the contract and collaborative agreement eventually entered into between Defendants, Golde, The Regents and Defendant, Genetics Institute, Defendant Golde entered into a sepa-

rate and distinct, private agreement with Genetics Institute under which he became a paid consultant of Defendant Genetics Institute, and, in addition, has acquired the rights to 75,000 shares of common stock in Defendant, Genetics Institute at a cost of $750.

(p) The fact that, on or about May 26, 1981, Defendants Golde, The Regents and Genetics Institute entered into a collaborative agreement and contract which focused solely on the exploitation and commercial development of the cell lines and products thereof extracted by defendants from plaintiff, and which provided for the payment by Genetics Institute to Defendants Golde and The Regents of at least $300,000.00 over three years, including a pro-rata share of Defendant Golde's salary and fringe benefits, in exchange for which Defendant Genetics Institute received exclusive access to the materials and research performed on the cell lines and products thereof extracted from plaintiff, and which provided for payment of those amounts to Defendant Golde personally should he leave the employ of Defendant Regents.

(q) The fact that, on or before early 1982, Defendants Golde, the Regents and Genetics Institute endeavored to obtain additional funding and financial support from major, multinational pharmaceutical firms for their efforts to develop and market commercial products of the cell lines and products thereof extracted from plaintiff by defendants without his knowledge or consent.

(r) The fact that on or about June 4, 1982, after extensive negotiations personally involving Defendant Golde, and Defendants The Regents and Genetics Institute, the major multinational pharmaceutical firm Defendant Sandoz Ltd., Sandoz United States, Inc., Sandoz Pharmaceutical Corporation aka Sandoz Inc. was added to the agreement, and the agreement was extended to include the payment of an additional $110,000.00 over a one year period, including a pro-rata share of Defendant Golde's salary and fringe benefits, and by which

Sandoz would use its resources to assist in, and have exclusive rights to the development of the cell lines and products thereof extracted from plaintiff by defendants, including clinical trials and commercial product research.

(s) That on or about January 6, 1983, Defendants Golde and Quan were again named as inventors on an application for a U.S. Patent on the Mo-cell Line filed by Defendant, The Regents, and that on October 31, 1983, Defendant Regents officially abandoned its prior and unsuccessful patent application on the same cell line, which was among the cell lines and products thereof extracted from plaintiff, and which patent was eventually issued on March 20, 1984.

(t) The fact that Defendants and Quan renamed and relabeled certain valuable cell lines and products thereof originally named "Moore", "Mo", "Mo-T", and "Mo-B", etc. as "RLC", a label which was selected to preclude detection by plaintiff or others who might be possibly interested in defendants' activities regarding the cell lines and products thereof extracted from plaintiff by defendants.

(u) The fact that, throughout this period, Defendant Quan spent as much as 70% of her time working for Defendant Regents on research, cultures, and related activities solely and exclusively devoted to cell lines and products thereof extracted from plaintiff, and that Defendant Golde and others within the employ of Defendant Regents also spent large amounts of their time and devoted large portions of their budgets on efforts to exploit and develop the cell lines and products thereof extracted from plaintiff without plaintiff's knowledge or consent.

(v) The fact that upon the conclusion of the said collaborative agreement between Defendant, The Regents, Defendant Golde, and Defendant Genetics Institute, the separate and distinct contractual arrangement relating to ongoing payment of consulting fees and the vesting of

shares of Genetics Institute, Inc. stock to Defendant, Golde continued and continues through the present.

(w) The fact that Defendants Golde and Quan, Defendant The Regents, and Defendant Genetics Institute, through their collaborative efforts utilizing the cells and cell lines extracted from plaintiff without his knowledge or consent, have duplicated and cloned the genetic sequence possessed by plaintiff's unique cells, Blood and Bodily Substances, and have in fact applied for the issuance of patents on two specific genetic sequences producing two of the unique and valuable lymphokines produced by the cells and cell lines extracted from plaintiff. One patent relates to a method of genetically cloning and producing the lymphokine colony known as Stimulating Factor Protein (GM-CSF) and the other patent application relates to a method for genetically cloning and producing the lymphokines known as Erythroid-Potentiating Activity (EPA).

(x) The fact that the issuance of the above named patents, and the research leading to those applications made possible by defendants' extraction from plaintiff of his unique cells, Blood and Bodily Substances, will provide defendants with a significant competitive advantage over other commercial entities and researchers engaged in the effort to produce commercially and therapeutically useful products containing the valuable lymphokines described herein.

(y) Although the true clinical potential of each of the lymphokines produced by the cells and cell lines extracted from plaintiff are difficult to predict, defendants have been and are aware that competing commercial firms in these relevant fields have published reports in biotechnology industry periodicals predicting a potential market of approximately $3.01 Billion Dollars by the year 1990 for a whole range of Colony Stimulating Factors (CSF) including the Granulocyte Macrophage-Colony Stimulating Factor (GM-CSF) which Defendant, Genetics Insti-

tute and Defendant Golde are aware is the subject of the above-mentioned pending patent application and was derived exclusively from plaintiff's Blood and Bodily Substances and from the cells and cell lines extracted from plaintiff.

42. Following the instructions of the defendants, and after numerous prior visits, plaintiff again visited their facilities on or about April 11, 1983 for the removal of additional quantities of his Blood and Bodily Substances by the defendants, and on that occasion was presented for the first time with a consent form concerning the withdrawal of plaintiff's blood for research apparently concerning the virus related to plaintiff's disease.

43. The defendants did not inform plaintiff what those research and other purposes were or might be or even what various terms meant in this context, nor did they inform him of their prior independent research and commercial activities utilizing and requiring his Blood and Bodily Substances, nor did they inform him of events such as those listed in Paragraph No. 41, supra, nor did they inform him of the value of his Blood and Bodily Substances in these research and commercial activities, nor that such activities were in furtherance of defendants' economic, financial and competitive interests.

44. Therefore, based on defendants' failure to disclose and intentional concealment of the true facts and their true intentions, activities and interests in this regard, plaintiff, under the belief that such consent merely authorized defendants to perform purely academic and non-commercial research relating to the virus associated with his disease, intended to benefit plaintiff's actual medical and health care and that of all humanity, on those blood samples withdrawn from plaintiff on that occasion, consented to such use.

45. Had plaintiff known of the true facts and defendants' true research and commercial activities and inten-

tions in this regard, and the value of his Blood and Bodily Substances in those intentions and activities, and of the value of his cell line and the nature and value of the rights thereto, plaintiff would not have given the consent reflected in the form first presented to him by the defendants on or about April 11, 1983.

46. On or about September 20, 1983, during the first visit following the April, 1983 visit by plaintiff to defendants' facilities, plaintiff returned at the request of the defendants for the removal and withdrawal of additional quantities of plaintiff's Blood and Bodily Substances.

47. On this occasion on September 20, 1983 the defendants again presented to plaintiff a written consent form. This form requested consent for research and other purposes concerning cell-lines to be derived from said samples and his rights thereto, and plaintiff specifically and in writing indicated that he *did not* voluntarily grant to the defendants any and all rights he had in any cell-line or any other potential product which might be developed from the blood sample obtained from plaintiff on that date. Defendant David W. Golde, M.D. personally witnessed plaintiff's written indication of his non-waiver of such rights on that date. A true and complete photocopy of this document is attached herewith as Exhibit "A".

48. Plaintiff consented to the withdrawal and removal of his Blood and Bodily Substances on or about September 20, 1983 based solely upon the representations of the defendants that such withdrawal and removal were required and necessary for his medical and health care. Plaintiff's consent on that occasion was further based upon the representations of the defendants that any research performed upon the Blood and Bodily Substances removed on that date would be used by the defendants for purely academic and non-commercial scientific pur-

poses concerning the viral cause of his disease and would be used to assist in his actual medical and health care.

49. Plaintiff was never informed, either by the form presented to him by the defendants on or about September 20, 1983, or in any other way, nor did he know, nor did he have any reasonable basis on which he should or could have known, of the true facts and activities of defendants in their independent research and commercial activities utilizing and exploiting upon his Blood and Bodily Substances, nor of the events such as those listed in Paragraph No. 41, supra, nor of the value of those Substances in those activities, nor of defendants' economic, financial and competitive benefit to be gained thereby.

50. In fact, despite defendants' complete and actual knowledge of plaintiff's specific written intention *not* to waive any rights to any cell lines or products thereof derived or extracted from him during his visit to defendants' facilities on September 20, 1983, defendants nevertheless disseminated and endeavored to continue their commercial exploitation activities using Blood and Bodily Substances withdrawn from plaintiff on that date, and to further commercially exploit cell lines and products thereof extracted from plaintiff's Blood and Bodily Substances withdrawn by defendants on that date.

51. Had plaintiff known of the above facts and defendants' true research and commercial intentions and plans in this regard, and the value of his Blood and Bodily Substances in those intentions and plans, and how they were unrelated to his actual medical and health care, he would not have submitted to the removal and withdrawal of his Blood and Bodily Substances by the defendants on or about September 20, 1983.

52. Defendants and each of them had a trustee and fiduciary relationship with plaintiff and as such held themselves out and represented that they were acting for

plaintiff's best interest and welfare, and as fiduciaries were required to exercise the highest good faith towards plaintiff, to make full disclosures of all relevant and material facts, and to disclose their true intentions and opinions, and not to obtain or acquire any adverse interest nor to gain any advantage over plaintiff nor to make any special or secret profit nor to take unfair advantage of plaintiff, nor to profit unfairly, but on the contrary, had an affirmative duty and obligation to do everything necessary and proper for plaintiff's health, welfare, and interest, and not to compromise plaintiff's medical, surgical, or health care and well-being, for their own personal goals and independent research and commercial activities, and to disclose all facts relating to his care and treatment, and to the uses of his Blood and Bodily Substances, and of their intention to profit from their activities and to disclose that they were going to and did seek and obtain a patent, and of their true opinion and plans with regard to the present, potential and prospective uses and value of his Blood and Bodily Substances.

53. None of the defendants ever disclosed to plaintiff that his Blood and Bodily Substances had and have potentially enormous economic and commercial value, but on the contrary, the defendants and each of them, misrepresented the facts and fraudulently and deliberately concealed and failed to disclose to plaintiff their true intentions, that in addition to providing research material for countless scientific articles, plaintiff's Blood and Bodily Substances were also being utilized for economic and commercial value and continued to conceal these facts from plaintiff so as to develop and obtain a patent, the patent entitled "Unique T-Lymphocyte Line and Products Derived Therefrom", commonly designated as the "Mo-cell Line" and bearing United States Patent Number 4,438,032 (a continuation of pending prior application SER.NO. 229,900 filed January 30, 1981—now abandoned), which patent was granted to David W. Golde, M.D. and Shirley G. Quan on March 20, 1984, and

concurrently partially assigned to the Regents of the University of California, and was also sold, transferred, assigned, licensed, leased and otherwise made available to the defendants, and each of them, for substantial economic and commercial value.

54. The Mo-cell Line which was the subject of this patent is but one of the many and numerous cell lines and products thereof extracted from plaintiff without his knowledge or consent, and known to the defendants to be highly valuable and unique and available only through their continued access to and exploitation of plaintiff's unique Blood and Bodily Substances, including but not limited to the Mo-cell Lines, the Mo-T Lines, the Mo-B Cell Lines, the J Cell Lines, the RLC Cell Lines, the various conditioned mediums, by-products, lymphokines, factors, activities, serums, genetic sequences, genetic materials, and other substances and materials extracted from plaintiff by defendants.

55. The subject of the patent issued to the defendants on March 20, 1984 and the Mo-cell Line were derived entirely from plaintiff's Blood and Bodily Substances and the products so obtained provide a more economic and expeditious alternative to gene-splicing techniques currently employed to isolate beneficial components of blood that may be useful in the care and treatment of leukemia and other conditions.

56. Plaintiff was not aware of the fact that defendants were seeking commercial exploitation of his Blood and Bodily Substances and they concealed from plaintiff that they were seeking to obtain a patent and to market, sell, use, lease and otherwise develop plaintiff's Blood and Bodily Substance for economic benefit and profit and defendants did not provide plaintiff with an opportunity to participate in the economic benefits or to challenge defendants' efforts to seek or obtain a patent which provided defendants with a monopoly and exclusive control over the Mo-cell Line, but deliberately concealed that in-

formation from plaintiff who did not learn of those facts until after March 20, 1984, when the patent had already been granted.

57. Among some of the products of the Mo-cell Line derived from Plaintiff's Blood and Bodily Substances, and patented by the defendants, and described by defendants in said patent, are the following:

(a) Colony Stimulating Factor (CSF). This polypeptide provides in vitro proliferation and differentiation of granulocyte-macrophage progenitors.

(b) Erythroid-Potentiating Activity (EPA). This polypeptide enhances the proliferation of human erythroid progenitors in vitro. This EPA can find use in enhancing the development of erythrocytes (red blood cells) in blood; the production of erythrocytes in vitro; evaluating the ability of stem cells to form erythrocytes; and the potentiality for treatment of a human host having a deficiency of EPA and the like.

(c) Immune Interferon (Type II). The Mo-cell Line has the potentiality for developing Interferon substantially free from other Interferon (and thus far more useful) and producing various proteins that can be separated out which include: (1) Macrophage-activating factors; (2) a factor that stimulates colony formation by human leukemia cells in vitro; and (3) a factor that stimulates megakaryocyte growth in vitro—by utilizing hybrid DNA technology.

(d) Neutrophil Migration-Inhibitory Factor (NIF-T).

(e) T-cell Growth Factor (TCGF, Interleukin II).

(f) Macrophage-Activating Factor (MAF)—the scavengering effect of large, highly phagocytic cells.

(g) Factor-Stimulating Fibroblast Growth.

(h) Factor-Stimulating Human Pluripotent Hematopoietic Stem Cell (may be the same as (b))—pertaining to the formation of the development of blood cells.

(i) Factor-Stimulating Human Leukemic Cells in vitro (may be the same as (a) or (b)).

58. Plaintiff is informed and believes and thereon alleges that the defendants, using exclusively the cell lines and products thereof extracted from plaintiff by them, have applied and are in the process of applying for and preparing additional patents based upon unique and valuable cell lines, lymphokines, factors, and other products thereof extracted or derived by defendants from plaintiff and his Blood and Bodily Substances.

59. Plaintiff alleges that he is the owner of his Blood and Bodily Substances and of the by-products produced therefrom and that as such, plaintiff was not informed of the truth regarding the value of his contribution and did not provide free and voluntary consent to their use. Had the plaintiff known the true facts, he would have insisted upon participation in decisions regarding control of their use, and he would have sought and obtained compensation therefor, and thus is entitled to be compensated for the full value of his contribution to defendants' patent and the other uses to which his Blood and Bodily Substances have been utilized.

60. Plaintiff alleges that his Blood and Bodily Substances, including but not limited to his blood, blood components, by-products, bodily tissues, lymphokines, genetic material, genetic sequences, conditioned medium, spleen, sperm, bone marrow aspirate, and other substances derived from his Blood and Bodily Substances, are his tangible personal property, and the activities of the defendants as set forth herein constitute a substantial interference with plaintiff's possession or right thereto, as well as defendants' wrongful exercise of dominion over plaintiff's personal property rights in his Blood and Bodily Substances.

61. Plaintiff is informed and believes and thereon alleges that defendants obtained access to his Blood and Bodily Substances through a relationship of trust and

confidence and with the intent to deprive or withhold from plaintiff the right of control of his unique and valuable Blood and Bodily Substances (including, but not limited to, his cells, cell-lines, serum, bone marrow aspirate, lymphokines, blood factors, conditioned medium, spleen, sperm, blood, blood components, bodily tissues, genetic material, genetic sequences, and other by-products thereof), and defendants took, used, and exploited, without plaintiff's authorization, those Blood and Bodily Substances and valuable characteristics thereof. Plaintiff further alleges that defendants, without authority and in breach of the obligations created by that relationship of trust and confidence, made or caused to be made directly from and in the presence of the specimens of plaintiff's Blood and Bodily Substances, cultures and reproductions of plaintiff's cells and other substances.

62. Plaintiff alleges that his Blood and Bodily Substances were absolutely essential to defendants' research and commercial activities with regard to his cells, cell-lines, the Mo cell-line, conditioned medium, Mo conditioned medium, serum, lymphokines, and the by-products thereof, and that defendants could not have applied for and had issued to them the Mo cell-line patent and other patents described herein without obtaining and culturing specimens of plaintiff's Blood and Bodily Substances. Plaintiff further alleges that the Mo cell-line and related factors, lymphokines, by-products thereof, as well as all the other cell-lines and by-products derived from plaintiff's Blood and Bodily Substances by defendants, were not developed or derived through any extraordinary or unusual scientific genius or methodology invented or employed by defendants, nor were they created or invented by defendants, but rather were obtained exclusively through defendants' simple removal of live specimens and samples of plaintiff's Blood and Bodily Substances, and the subsequent growth and culturing of those cells and specimens in commonly available conditions using commonly known procedures in order to en-

able the defendants to observe, extract, exploit, disseminate, and otherwise utilize plaintiff's Blood and Bodily Substances and their unique and valuable characteristics, including the application for the patent described herein as well as other patents pending and/or yet to be applied for.

63. As a direct and proximate result of the defendants' conduct in concealing the true facts and their intention and in converting and appropriating plaintiff's Blood and Bodily Substances, including but not limited to each and every one of the cell lines and each and every one of the products derived therefrom and extracted from plaintiff by the defendants, as specified and referenced above, without his consent, plaintiff has been damaged now and in the future, and hereby seeks compensation for such damages.

64. Plaintiff is informed and believes and thereon alleges that the potential commercial market for products of the type obtained from his Blood and Bodily Substances are substantial, and that defendants will continue to be unjustly enriched now and in the future, but the true value of said products and of plaintiff's damages and of defendants' profits cannot be fully evaluated at this time.

65. Plaintiff's damages as a result of defendants' activities, as well as the recovery sought by this Complaint, necessarily includes and specifically incorporates by this reference all manifestations, samples, products, patents, licenses, profits, inventions, genetic sequences, genetic material, and other manifestations or products of the cells, cell lines, and products thereof extracted from plaintiff by defendants which currently have, or at one time did have, or will have in the future tangible form and/or financial or commercial value.

66. As a direct and proximate cause of the wrongful conduct of the defendants, and each of them, plaintiff has suffered and sustained injuries and damages, and lost

profits, lost wages, and incurred expenses and suffered economic loss and other elements of special damages, and defendants, and each of them, have been unjustly enriched, and defendants will continue to benefit unjustly in the future, and plaintiff's injuries, damages and losses are permanent, and are within the jurisdiction of the Superior Court, all in an amount to be established at the time of trial.

67. As a direct and proximate cause of the wrongful conduct of the defendants, and each of them, plaintiff has sustained additional consequential damages and injuries and lost the benefit of the bargain, and has suffered mental and emotional distress, and other elements of general damages and will continue to suffer said injuries and damages in the future, in that said injuries are permanent and plaintiff has been injured and damaged in an amount within the jurisdiction of the Superior Court, to be established at the time of trial.

68. Plaintiff is informed and believes and thereon alleges that Defendant Genetics Institute, Inc. is a corporation doing business in the State of California headquartered in the State of Massachusetts with total assets in excess of $23.5 million dollars.

69. Plaintiff is informed and believes and thereon alleges that Defendant, Sandoz Ltd. is a Swiss corporation with over 130 subsidiaries and affiliates throughout the world with U.S. subsidiaries and affiliates as follows: Defendant, Sandoz United States, Inc., Defendant, Sandoz Pharmaceutical Corporation aka Sandoz Inc., a Delaware corporation, and others. Plaintiff is informed and believes and thereon alleges that Defendant, Sandoz Ltd. has a net worth in excess of $2 billion dollars.

70. Defendants' conduct, in acquiring plaintiff's consent, misappropriating his Blood and Bodily Substances, obtaining a patent on the cell line extracted from him, and copying and seeking the issuance of patents on ge-

netic sequences extracted from plaintiff, was in conscious disregard of plaintiff's rights, and was accompanied by fraud, malice, and oppression, in violation of California Civil Code, Section 3294.

71. As a further direct and proximate result of such conduct, plaintiff sustained injury and damages and seeks punitive damages to make an example of the defendants and each of them, in a sum to be established at the time of trial.

SECOND CAUSE OF ACTION FOR LACK OF INFORMED CONSENT AGAINST ALL DEFENDANTS

72. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 62 of the First Cause of Action as though the same were set forth in full herein.

73. Plaintiff alleges that each Defendant had a duty to disclose all relevant information to enable plaintiff to make an informed decision regarding the use of his Blood and Bodily Substances, and that the Defendants failed to provide plaintiff with such disclosures and therefore plaintiff did not provide an informed consent, and the Defendants are therefore liable to plaintiff for all damages sustained.

74. Defendants' conduct, in inducing plaintiff to allow defendants to extract from him his unique and valuable cell lines and products thereof, and other tangible forms of his Blood and Bodily Substances, was done in violation of law and of specific statutory and regulatory requirements for informed consent to be obtained from patients in experimental settings, including but not limited to regulations promulgated by the National Institutes of Health, Health and Human Services Department; California Health and Human Safety Code, the California

Hospital Association Informed Consent Manual, and other appropriate and relevant statutory and regulatory provisions.

75. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 63 through 71 of the First Cause of Action as though the same were set forth in full herein.

THIRD CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY AGAINST ALL DEFENDANTS

76. Plaintiff JOHN MOORE hereby incorporates each and every allegation contained in Paragraphs 1 through 62, inclusive, of the First Cause of Action, as though the same were set forth in full herein.

77. At all times herein mentioned, Defendants and each of them, had a fiduciary relationship with plaintiff and held themselves out as acting for plaintiff's best interest and welfare and with the utmost good faith and for the benefit of maintaining plaintiff's rights, financial interest, property, medical care, health care, surgical care and well-being and benefit, and had an affirmative duty and obligation to disclose to plaintiff all of the relevant facts and their true intensions and their true opinion with regard to the present, potential, and prospective value and use of his Blood and Bodily Substances.

78. Defendants breached their fiduciary duty to plaintiff and as a direct and proximate result of the conduct engaged in by defendants and each of them, plaintiff suffered the following injury and damage.

79. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 63 through 71 of the First Cause of Action as though the same were set in full herein.

FOURTH CAUSE OF ACTION FOR FRAUD AND DECEIT AGAINST ALL DEFENDANTS

80. Plaintiff JOHN MOORE hereby incorporates each and every allegation contained in Paragraphs 1 through 62, inclusive, of the First Cause of Action, as though the same were set forth in full herein.

81. The conduct of the defendants, and each of them, in carrying out each of the matters set forth herein, was done fraudulently and deceitfully and in violation of *California Civil Code* § 1572 and *California Civil Code* § 3343 and deceitfully in violation of *California Civil Code* § 1710.

82. Had plaintiff been aware of the true facts, he would not have agreed to or permitted defendants to become unjustly enriched and to exploit his Blood and Bodily Substances for their own economic benefit and again in conscious disregard of his rights.

83. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 63 through 71 of the First Cause of Action as though the same were set forth in full herein.

FIFTH CAUSE OF ACTION FOR UNJUST ENRICHMENT AGAINST ALL DEFENDANTS

84. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 62 of the First Cause of Action as though the same were set forth in full herein.

85. The acquisition of plaintiff's Blood and Bodily Substances by Defendants and each of them was wrongful, and the keeping of the property and title to the patent thereof and other financial benefits would constitute unjust enrichment.

86. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 63 through 71 of the

First Cause of Action as though the same were set forth in full herein.

SIXTH CAUSE OF ACTION FOR QUASI-CONTRACT AGAINST ALL DEFENDANTS

87. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 62, inclusive, of the First Cause of Action as though the same were set forth in full herein.

88. Defendants, and each of them, obtained plaintiff's Blood and Bodily Substances by constructive fraud, undue influence, and by violation of their fiduciary duty inherent in their confidential relationship with plaintiff, and breached their trust obligations to plaintiff, thereby acquiring plaintiff's Blood and Bodily Substances, causing plaintiff to unjustly suffer loss while making a profit for and unjustly benefiting themselves thereby, and a constructive trust should thereby be imposed and plaintiff recover damages in quasi-contract for violation of their fiduciary duty.

89. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 63 through 71 of the First Cause of Action as though the same were set forth in full herein.

SEVENTH CAUSE OF ACTION FOR BAD FAITH BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING AGAINST ALL DEFENDANTS

90. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 62 inclusive of the First Cause of Action and incorporates the same herein by reference as if set forth in full.

91. Plaintiff alleges that he and Defendants Golde and the Regents entered into a contractual relationship in which Defendants Golde and the Regents offered and

agreed to provide plaintiff with appropriate medical care in the treatment and monitoring of plaintiff's condition, and plaintiff accepted that offer and consented to defendants' performance of certain medical services.

92. Plaintiff alleges that, at all times relevant herein, Defendant Golde, both in his capacity as a physician and in his separate capacity as a researcher, engaged in commercial activities, was an employee, officer, and/or agent of Defendant, The Regents of the University of California; and at all times after on or about 1980, continuing through the present, Defendant Golde, both in his capacity as a physician in the physician-patient relationship with plaintiff, and as a researcher and investor, engaged in the commercial exploitation of the products extracted from plaintiff, was an employee, officer, investor, advisor, consultant and/or agent of Defendants, Genetics Institute, Inc., Sandoz Ltd., Sandoz United States, Inc., Sandoz Pharmaceutical Corporation aka Sandoz Inc. In these applicable capacities, Defendant Golde acted with the knowledge and support of Defendant, The Regents of the University of California and/or Defendants, Genetics Institute, Inc., Sandoz Ltd., Sandoz United States, Inc., Sandoz Pharmaceutical Corporation aka Sandoz Inc., which knew or should have known of the physician-patient relationship with plaintiff, the means by which Defendant Golde had obtained access to, and continued to have access to, plaintiff's Blood and Bodily Substances, and through their actions and compensation of Defendant Golde, ratified or approved Defendant Golde's activities in this regard.

93. Based on the existence of the special relationship between physician and patient, the attendant duty arising out of such special relationship was thereby imposed upon defendants not to do anything which would injure the right of the plaintiff to receive the full benefits of the agreement, including but not limited to providing such care without misrepresentation or fraud upon

plaintiff, and openly and honestly communicating to plaintiff and providing plaintiff with the benefit of defendants' specialized knowledge and awareness of the unique value of plaintiff's Blood and Bodily Substances which defendant was extracting and exploiting, and of defendants' plans and activities to exploit these Blood and Bodily Substances for commercial purposes and personal financial gains.

94. The contract entered into between plaintiff and defendants was a contract in which the parties were in an inherently unequal bargaining position, because of the far superior and specialized knowledge of defendants of the biotechnological, medical and other factors and circumstances, as contrasted with plaintiff's lack of such specialized knowledge, and plaintiff's serious medical condition, the diagnosis with which he was provided and the recommendations of required care.

95. Furthermore, the motivation for plaintiff for entering into this contract with defendants was clearly a nonprofit motivation, i.e., to secure his peace of mind, ongoing medical care, and future protection against the predicted course of his disease.

96. Plaintiff was especially vulnerable in this relationship with defendants because of the type of harm he might suffer in the relationship (both due to his medical condition and his justifiable and necessary reliance upon the presumed good faith and ethical conduct of his physician), and because plaintiff was never provided with any information regarding the true nature and purpose of defendants' independent research and commercial activities, and in fact such information was withheld from him by defendants and others.

97. Furthermore, defendants knew or should have known of plaintiff's vulnerability, both because of plaintiff's mental and physical condition throughout the period of diagnosis and treatment of his disease, and of

the great disparity in knowledge and expertise between the physician-researcher, and plaintiff, the patient, regarding the activities and commercial potential made possible by the extraction and exploitation of the cells, Blood and Bodily Substances of plaintiff.

98. Therefore, defendants had a heightened duty not to act unreasonably in breaching the contract between defendants and plaintiff, and to consider the interests of plaintiff as tantamount to defendants' own interests.

99. Defendants' breach of this duty of good faith and fair dealing arising out of the implied contract created between defendants and plaintiff cannot be remedied by ordinary contract damages, insofar as those damages are not adequate because they did not require defendants, the parties in the superior position, to account for their actions, and they do not make plaintiff "whole".

100. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 63 through 71 of the First Cause of Action as though the same were set forth in full herein.

101. Defendants' conduct, in acquiring plaintiff's consent, misappropriating his Blood and Bodily Substances, obtaining a patent on the cell line extracted from him, and copying and seeking the issuance of patents on genetic sequences extracted from plaintiff, was in conscious disregard of plaintiff's rights, and was accompanied by fraud, malice, and oppression, in violation of California Civil Code, Section 3294.

102. As a further direct and proximate result of such conduct, plaintiff sustained injury and damages and seeks punitive damages to make an example of the defendants, and each of them, in a sum to be established at the time of trial.

EIGHTH CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST ALL DEFENDANTS

103. Plaintiff JOHN MOORE hereby incorporates each and every allegation contained in Paragraphs 1 through 62, inclusive, of the First Cause of Action, as though the same were set forth in full herein.

104. The conduct of the defendants, and each of them, in carrying out each of the matters set forth herein, was done intentionally, deliberately, unreasonably and in reckless disregard of the consequences, and was likely to cause and designed to cause, and calculated to inflict, severe mental and emotional distress upon plaintiff, and constituted an intentional invasion of plaintiff's mental and emotional tranquility, and thereby proximately caused plaintiff severe mental and emotional distress, inflicting the following described injury and damages to plaintiff.

105. Plaintiff has sustained and suffered severe mental and emotional distress and shock, humiliation, shame, embarassment, anger, chagrin, disappointment, worry, and will continue to do so in the future.

106. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 63 through 71 of the First Cause of Action as though the same were set forth in full herein.

NINTH CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION AGAINST ALL DEFENDANTS

107. Plaintiff JOHN MOORE hereby incorporates each and every allegation contained in Paragraphs 1 through 62, inclusive, of the First Cause of Action, as though the same were set forth in full herein.

108. Defendants did not have any reasonable ground for representing such purpose and intent, but negligently

and recklessly made such representations, thereby inducing plaintiff to consent and permit defendants and each of them to withdraw plaintiff's Blood and Bodily Substances and utilize the same for commercial purposes.

109. As a direct and proximate result of the negligent misrepresentations made to plaintiff by defendants, and each of them, plaintiff suffered the following injuries and damages.

110. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 63 through 71 of the First Cause of Action as though the same were set forth in full herein.

TENTH CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE ADVANTAGEOUS ECONOMIC RELATIONSHIPS AGAINST ALL DEFENDANTS

111. Plaintiff JOHN MOORE hereby incorporates each and every allegation contained in Paragraphs 1 through 62, inclusive, of the First Cause of Action, as though the same were set forth in full herein.

112. Defendants and each of them by their aforesaid conduct, and wrongful methods, motive and purpose, wrongfully, improperly, intentionally, fraudulently, maliciously and oppressively diverted and took from plaintiff prospective business relations and economic advantages by appropriating control and exclusive right of sale, use, and distribution of plaintiff's Blood and Bodily Substances from plaintiff.

113. Defendants' intentional interference with plaintiff's advantageous economic relationships, past, present, and future, has directly and proximately caused and will continue to cause injury and damage to the plaintiff, as further herein alleged.

114. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 63 through 71 of the

First Cause of Action as though the same were set forth in full herein.

ELEVENTH CAUSE OF ACTION FOR SLANDER OF TITLE AGAINST ALL DEFENDANTS

115. Plaintiff JOHN MOORE hereby incorporates each and every allegation contained in Paragraphs 1 through 62, inclusive, of the First Cause of Action, as though the same were set forth in full herein.

116. Defendants, and each of them, made false and unprivileged oral and written statements disparaging plaintiff's right and title to his Blood and Bodily Substances and by asserting to an exclusive interest in the Blood and Bodily Substances, cast doubt upon the ownership of plaintiff's Blood and Bodily Substances, and upon the true value thereof, and thereby disparaged the interest which plaintiff had in his Blood and Bodily Substances, thereby directly and proximtaely causing actual pecuniary damages to plaintiff as herein further alleged.

117. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 63 through 71 of the First Cause of Action as though the same were set forth in full herein.

TWELFTH CAUSE OF ACTION FOR ACCOUNTING AGAINST ALL DEFENDANTS

118. Plaintiff JOHN MOORE hereby incorporates each and every allegation contained in Paragraphs 1 through 62, inclusive, of the First Cause of Action, as though the same were set forth in full herein.

119. At all times herein mentioned, Defendants and each of them, had a fiduciary relationship with plaintiff and held themselves out as acting for plaintiff's best interest and welfare and with the utmost good faith and for the benefit of maintaining plaintiff's medical care, health care, surgical care and well-being and benefit, and

had an affirmative duty and obligation to disclose to plaintiff all of the relevant facts and their true intentions and their true opinion with regard to the present, potential, and prospective value and use of his Blood and Bodily Substances.

120. As a result of the aforementioned actions and conduct of the defendants, each of them, plaintiff is owed a balance due from the defendants, and each of them, in an amount which, due to the complexity of the scientific and commercial transactions and relationships involved herein, can only be ascertained by an accounting.

121. Plaintiff hereby requests that defendants, and each of them, provide a complete and thorough accounting to plaintiff with respect to the uses and financial arrangements engaged in relating to plaintiff's Blood and Bodily Substances and any patent or other uses thereof, and of any and all contractual relationships, whether oral or written, whether by lease or sale or otherwise, whether by use exclusively or otherwise, with any and all other entities or parties as a result of research related to this property, and to provide a complete accounting of past, present, and future monies to be received in connection with any and all commercial uses or applications, or any rights or privileges arising therefrom, including but not limited to licenses, fees, and similar transactions, derived from any commercial or otherwise financially measurable activities due to defendants' conduct with regard to the plaintiff's Blood and Bodily Substances, and the uses for which it has been put, including, but not limited to the development of the cell-line and any patent required therein.

THIRTEENTH CAUSE OF ACTION FOR DECLARATORY RELIEF AGAINST ALL DEFENDANTS

122. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 62 of the First Cause of Action as though the same were set forth in full here.

123. There exists a dispute regarding the right, title, interest and duties of the parties in regard to plaintiff's Blood and Bodily Substances and the products derived therefrom and to the economic and commercial uses and value thereof.

124. Plaintiff seeks a declaration from this Court in regard to the respective right, title, duties and obligations of each of the parties to this action. Plaintiff is informed and believes and thereon alleges that a large number of important financial and ownership issues are raised by this lawsuit, which are curently unresolved and present immediate uncertainty in the decision making processes of each of the parties involved, including but not limited to the disposition and commercial development of the variety of cell lines and products thereof extracted from plaintiff as specified above, and issue of future commercial and financial benefits to be obtained thereby. Furthermore, defendants' current and repeated assertions that plaintiff has no right, title or interest to the proceeds and products of the cell lines and products thereof derived from his Blood and Bodily Substances and extracted from him by defendants, has caused and will continue to cause serious and irreversible harm to the commercial and financial value of those cell lines and products thereof, especially as they raise uncertainty and doubt as to the rights of ownership, and place potentially interested parties in fear of expensive and protracted litigation should these important issues not be resolved by this court.

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

(a) For general and special damages according to proof in an amount within the jurisdiction of the Superior Court;

(b) For an accounting by defendants and each of them;

(c) For punitive damages pursuant to *California Civil Code*, § 3294 in a sum to be established at the time of trial;

(d) For a declaration from this Court in regard to the respective right, title, duties and obligations of each of the parties with respect to plaintiff's Blood and Bodily Substances and the products derived therefrom, and to the economic and commercial uses and value thereof; and

(e) For such other and further relief as the Court deems just.

DATED: October 22, 1985.

GAGE & MUZURSKY
A Law Corporation

By /s/ Sanford M. Gage
SANFORD M. GAGE
Attorneys for Plaintiff

EXHIBIT A

UCLA SCHOOL OF MEDICINE

INFORMED CONSENT FOR USE OF BLOOD AND BONE MARROW TISSUE FOR MEDICAL RESEARCH CONCERNED WITH "GROWTH OF HUMAN HEMATOPOIETIC CELLS IN VITRO"

I understand that a portion of the tissue removed in the course of the investigation and treatment of my illness may be used for the purpose of scientific investigation of the body's defense against disease. The tissue to be studied includes:

> Blood specimens √ ; Bone marrow removed as part of the routine clinical diagnosis or management of my illness ——.

The procedure will be performed by David W. Golde, M.D., or [Illegible], a qualified person designated by him. I understand that the information obtained by the scientists performing the study of my blood or bone marrow may not benefit me directly and my condition may become worse despite participation but the study will provide additional information which may aid the medical profession and other scientists in the understanding of how the body defends itself against disease. I understand that I can inquire of the Project Director at any time as to the results obtained and will be given complete information. Although the results of the study may be published, I understand that my identity will not be disclosed without my separate consent, except as specifically required by law. I also understand I can withdraw at any time my consent to participate in this study and discontinue participation at any time without prejudice, and refusal to participate will not prejudice any future care. I understand that circumstances may arise which might cause the investigator to terminate my participation before the completion of the study.

I understand that if I have any question, comments, or concerns about the study or the informed consent process, I may write or call the office of the Vice Chancellor Research Programs, 3134 Murphy Hall, UCLA, Los Angeles, CA 90024, (213) 825-8714.

I understand that David W. Golde, M.D., who can be reached in the Division of Hematology-Oncology, Department of Medicine, UCLA School of Medicine, Los Angeles, CA 90024, (213) 825-1753, will answer any questions I may have at any time concerning details of the procedures performed as part of this study. If the study design or the use of the information is to be changed, I will be so informed and my consent obtained.

On signing this consent form, I acknowledge receiving a copy of the form, as well as a copy of the "Subject's Bill of Rights."

I understand that the University of California will provide any and all medical treatment reasonably necessary for any injury or illness which I suffer as a direct result of my participation in this research project, except when the injury or illness is a consequence of the medical research procedure which is designed to benefit me directly. The University does not provide any other form of compensation for injury.

I do not voluntarily grant to the University of California any and all rights I, or my heirs, may have in any cell line or any other potential product which might be developed from the blood and/or bone marrow obtained from me.

Date of Expiration: December 31, 1983

HSPC #81-09-699-2 September 1982

I have been asked to participate in a research project which is designed to investigate the function of blood-forming cells in various disease states and the research will be ongoing for four years. I understand that the reason for my inclusion in this study is because I have a disorder involving blood cells.

/s/ John Moore — 9/20/83
Signature of Patient — Date

/s/ David Golde — 9/20/83
Signature of Witness — Date

Investigators: David W. Golde, M.D., and associates
Division of Hematology-Oncology
Department of Medicine
UCLA School of Medicine
Los Angeles, California 90024

Tel.: (213) 825-1753

U.C.L.A. Human Subject
Protection Committee
Approved Oct. 20, 1982

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 9454 Wilshire Boulevard, Suite 501, Beverly Hills, California 90212.

On October 24, 1985 I served the foregoing document described as the THIRD AMENDED COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

ALLEN B. WAGNER
OFFICE OF THE GENERAL COUNSEL
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2199 Addison Street
Berkeley, CA 94720

Peter Abrahams, Esq.
O'FLAHERTY, ABRAHAMS & CARL
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Supreme Court, U.S.
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No. 90-1037

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JOHN MOORE,
Petitioner,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
DAVID W. GOLDE, M.D., SHIRLEY G. QUAN,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

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RESPONDENT REGENTS OF THE UNIVERSITY OF CALIFORNIA BRIEF IN OPPOSITION

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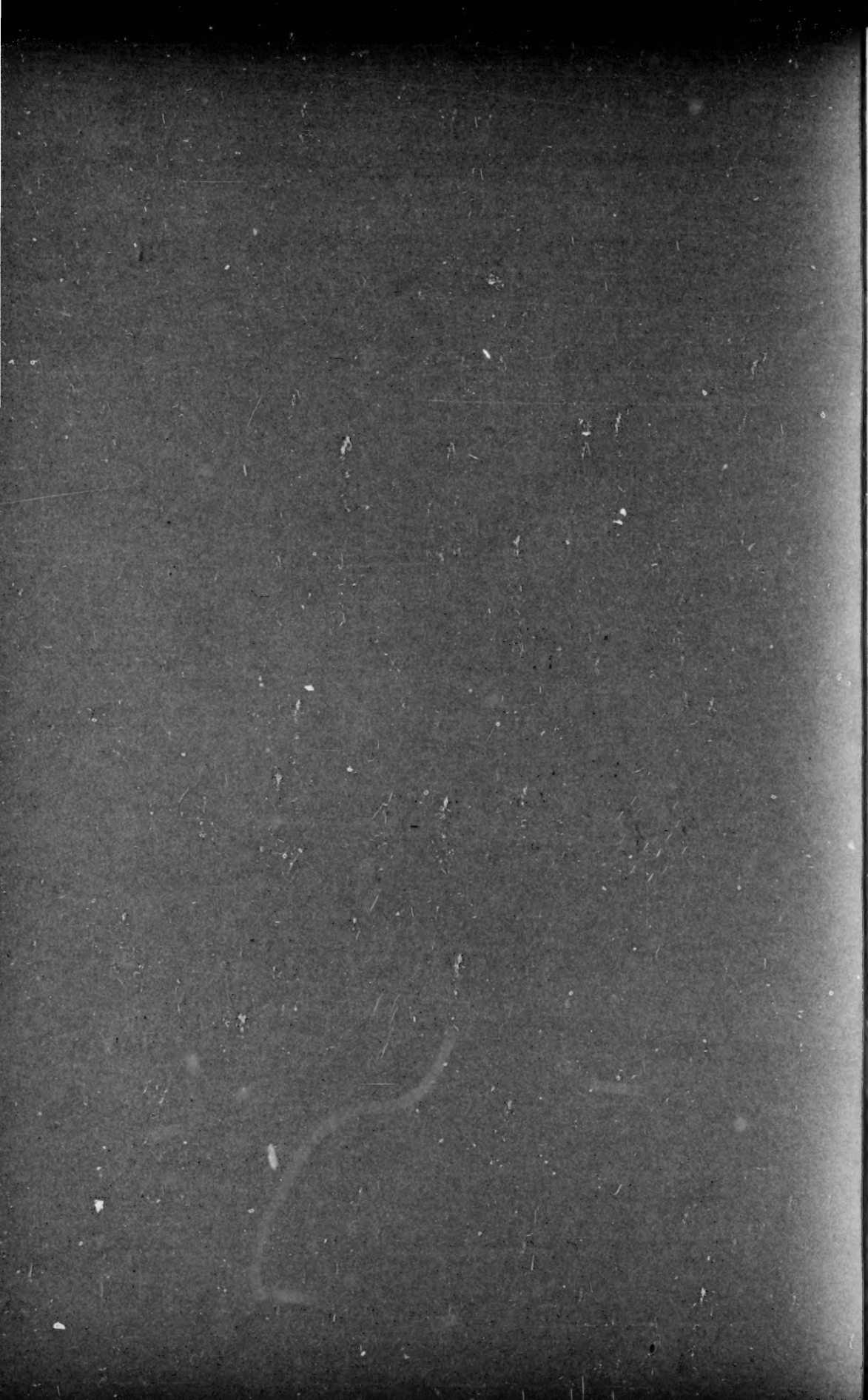

QUESTION PRESENTED

Does a State Supreme Court decision denying a patient's claim for common law conversion of therapeutically excised human tissue constitute a taking of property requiring just compensation under the Fifth and Fourteenth Amendments?

LIST OF PARTIES

The petitioner in this Court and the appellee/plaintiff below: John Moore. The respondents in this Court and appellants/defendants below: The Regents of the University of California; David W. Golde, M.D.; and Shirley G. Quan. Other appellants/defendants below not served the petition in this Court: Genetics Institute, Inc.; Sandoz, Ltd.; Sandoz United States, Inc.; and Sandoz Pharmaceuticals Corporation.

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PRELIMINARY STATEMENT OF FACT AND CASE

The principal issue decided by the California Supreme Court raised on Petition by John Moore ("Moore") is whether a patient's *unqualified* consent to surgery for medical purposes, at a teaching and research hospital, permits the scientific study of the therapeutically removed tissue, or whether such scientific study and disposition of research results constitutes a common law tort of conversion.

Couched in traditional language of conversion, lack of informed consent, breach of fiduciary duty, fraud and deceit, Moore's complaint sought to establish an unprecedented cause of action. While admitting consent to the surgical removal of his spleen for therapeutic purposes, Moore claimed additional consent was needed before The Regents of the University of California ("University") could conduct any scientific investigation involving the removed tissue, or before any disposition could be made of the University's research results. Moore alleged he came to the University's UCLA Medical Center in August, 1976 seeking confirmation and treatment for his diagnosed hairy cell leukemia. The diagnoses was confirmed and Moore was advised that his malignant spleen should be surgically removed. On or about October 19, 1976 Moore signed a *written consent* authorizing the splenectomy based upon the representation that its removal was "necessary for his care, treatment and diagnoses." The amended complaint does *not* challenge or question the need for that medical treatment or the representations about it.

Shortly before Moore's splenectomy, respondent David W. Golde, M.D., Professor of Medicine, instructed his research associate, respondent Shirley G. Quan, to obtain a specimen of the surgically removed spleen "to study and characterize the nature" of its cells and substances before its destruction. That study upon the splenic tissue resulted in the development of a cell line (denominated "Mo cell line") and continued over several years. It was reported to the University as a possible invention in August, 1979, almost three years after the splenectomy. Subsequently, the University applied for and received a patent on the invention.

The subject of Moore's claim is the Mo cell line, its related patent and the medical advancements of the University's study involving it. While Moore's complaint infers an improper connection between the University's

scientific study and his post-splenectomy medical treatment, it simply does *not* allege anything occurred absent, or in excess of, appropriate medical treatment for a proper medical purpose. Moore's action is *not* based upon any alleged medical malpractice, *nor* upon any physical or personal injury; rather, he seeks damages *solely* because he had not expressly consented to the University's post-operative "research *and* commercial activities."

The California Superior (trial) Court sustained the University's general demurrers through several versions of the complaint, with leave to amend, essentially holding that Moore's admitted consent was unqualified, not vitiated, and by reference incorporated into each cause of action. The court noted the complaint: did not deny Moore knew (or had reason to know) therapeutically removed tissue "might be used for medical and scientific study"; did not allege the University knew or intended (prior to the splenectomy) to exploit any commercial utility; and, did not allege any inconsistency between Moore's consent and the University's purpose in excising the tissues. Moore declined to further amend his complaint, and instead tendered a judgment dismissing the case which the court entered.

A divided California Court of Appeal reversed. (*Moore v. Regents of University of California, et al.*, 202 Cal. App.3d 1230 (1988). The majority held: that surgically removed human tissue was tangible private property of the patient; and that, absent expressed consent, the University's scientific study of such tissue constitutes a conversion. The dissent argued against the application of private property principles to surgical tissue, absent legislative enactment. It also suggested the consent to surgery constituted an abandonment of any patient property, since there was no expectation of a continued possessory interest.

A divided California Supreme Court affirmed in part, reversed in part, and remanded the case with direction to

the California Court of Appeal (*Moore v. Regents of the University of California, et al.*, 51 Cal.3d 120, 148 (1990). The majority held: that absent legislative enactment, the court would not create new tort duties expanding the strict liability of conversion for the scientific use of therapeutic human cells; that physicians must disclose to patients, their research and economic interest that may affect their judgment in rendering medical treatment, to protect patients from any conflicts of interests; and, accordingly, that Moore's third amended complaint stated a cause of action for breach of fiduciary duty or lack of informed consent against Dr. Golde, but not the other defendants, and did not state a cause of action for conversion.

REASON FOR DENYING THE WRIT

I. THERE IS NO "FEDERAL LAW QUESTION" SUPPORTING THE WRIT

Rule 10 of the United States Supreme Court provides that a writ of certiorari will be granted "only when there are special and important reasons therefore." The only Rule 10 criteria possibly applicable to this case is stated in 10.1(c) favoring writs where a "state court . . . has decided an important question of federal law . . . ." The California Supreme Court decision below did *not* decide a question of federal law.

In denying Moore's asserted common law tort of conversion, the California Supreme Court held:

> "There are three reasons why it is inappropriate to impose liability for conversion based upon the allegations of Moore's complaint. First, a fair balancing of the relevant policy considerations counsels against extending the tort. Second, problems in this area are better suited to legislative resolution. Third, the tort of conversion is not necessary to protect patient's rights. For these reasons, we conclude that the use of excised human cells in medical research does not amount to a conversion." (51 Cal.3d at 142-143.)

That analysis was predicated upon the Court's conclusion that, "Moore's novel claim to own the biological materials at issue in this case is problematic, at best." (*Ibid.*) That conclusion was based upon the Court's analysis of existing California law to determine if Moore "retained an ownership interest" in the cells following their surgical removal. The Court concluded:

> "[T]here are several reasons to doubt that he did retain any such interest. First, no reported judicial decision supports Moore's claim, either directly or by close analogy. Second, California statutory law drastically limits any continuing interest of a patient in excised cells. Third, the subject matters of the Regents' patent—the patented cell line and the products derived from it—cannot be Moore's property." (*Ibid.*, at 137.)

Thus, the California Supreme Court decision below rests upon its refusal to *extend* the principles of private property ownership to therapeutically excised cells for purposes of bringing a state law tort action of conversion.

The central misconception of Moore's petition to this Court is that the Constitutional mandate of "just compensation" requires, or even allows, federal courts to create a federal common law governing the ownership of therapeutically excised cells. On the contrary, such a property right must already exist under the appropriate body of law before federal "takings" analysis can come into play.

> "The first step in both due process and takings analysis is to determine whether there is a property right that is protected by the Constitution." (*Peterson v. U.S. Department of Interior*, 899 F.2d 799, 807 (9th Cir. 1990), cert. den., 111 S.Ct. 567 (1990).

Without this first step, there is no "taking within the meaning of the Fifth Amendment." (*Bowen v. Agencies Opp. to Soc. Sec. Entrap.*, 477 U.S. 41, 55-56 (1986).

> "Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance." (*Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980).

Using the takings clause to federalize property law would contravene its constitutional context. As this Court has repeatedly held, "the property rights protected by the Takings Clause are those property rights created by state law." (*Furey v. City of Sacramento*, 592 F.Supp. 463, 469 (E.D. Cal. 1984) affd., 780 F.2d 1448 (9th Cir. 1986).

Creating property interests is *not* a federal constitutional function:

> "'[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .'" (*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

The California Surpeme Court decision in this case does not raise an "important question of federal law" for this Court to review and decide; rather, the decision below is premised solely upon state common law of tort and property.

II. THE DECISION BELOW DOES NOT CONSTITUTE A TAKING REQUIRING JUST COMPENSATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

Moore's petition attempts to justify its appeal to this Court by arguing the decision below exceeds the constitutional constraints on state courts:

1. First, referring to dictum in *Demorest v. City Bank Farmers T. Co.*, 321 U.S. 36, 42 (1944) (a due process case decided on a non-federal ground), Moore notes ". . .

it is the providence of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis," to suggest the decision below is an arbitrary change of state property law.

2. Second, referring to *Webb's Fabulous Pharmacies, Inc. v. Beckwith, supra*, 449 U.S. 155, 164, Moore offers a torturous reading of the doctrine that a sovereign, ". . . , by *ipse dixit*, may not transform private property into public property without compensation, . . ." to suggest the decision below is an "arbitrary use of government power." (*Ibid.*)

However, the authorities cited in both arguments, are premised upon the existence of a property interest that is either arbitrarily changed or taken by the state. And, as already noted, the California Supreme Court decision is premised upon an analysis that a property ownership interest *does not exist* under California state law.

In *Demorest*, this court found a substantial non-federal basis existed for a new rule affecting trust beneficiaries, despite a difference of opinion in New York's Court of Appeals as to the effect of earlier cases on the subject. Emphasizing the novelty of the property claim facing the state court, this Court observed:

> "In thus rejecting appellants' version of its previous decisions the Court of Appeals disposed of their cases on the ground that appellants have never possessed under New York law such a property right as they claim has been taken from them. If this is the case, appellants have no question for us under the Due Process Clause." (*Demorest, supra*, 321 U.S. at 42.)

Similarly, the California Supreme Court conclusion that petitioner Moore lacked sufficient indicia of property ownership for an expanded application of common law conversion presents, "no question" under the Due Process Clause. In both its examination of Moore's interest under existing California law, *and* in its conclusion to defer to the legislature any decision to expand the strict

liability of conversion, the California Supreme Court did *not* evade a constitutional issue and fair support exists for the state's non-federal ground. Accordingly, as in *Demorest*, ". . . this Court [should] not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court." (*Ibid.*)

In *Webb's Fabulous Pharmacies*, this Court found an unconstitutional taking when the Florida county court withheld the interest accruing on a private interpleader fund deposited in the county court, where such deposit is required and a separate clerk's fee for "services rendered" based upon the amount deposited is also charged. Thus, the county's services were compensated and the interest represented an additional unrelated sum. However, that case lends no support to petitioner Moore. Unlike the novel and unestablished claim presented in *Moore*, the creditors in *Webb's* had ". . . a state-created property right to their respective portions of the fund." (*Webb's*, *supra*, 449 U.S. at 161.) That is the very premise lacking in *Moore*.

The California Supreme Court conclusion that existing state law does not provide a patient adequate ownership interest over therapeutically removed human cells to mandate a conversion cause of action, and the Court's deference to the legislature and refusal to extend the strict liability theory of conversion, does *not* constitute an arbitrary change or use of state law, or a taking requiring just compensation under the Fifth and Fourteenth Amendments.

III. PETITIONER'S TAKING CLAIM WAS WAIVED

Moore's petition (p. 13, fn. 14) argues at length that his taking claim was not ripe until his conversion cause of action was denied by the California Supreme Court decision below. However, the Fifth Amendment provides in pertinent part that private property shall not be ". . .

taken for public use, without just compensation." It ". . . does not prohibit the taking of private property, but instead places a condition on the exercise of that power." (*First Lutheran Church v. Los Angeles County* 482 U.S. 304, 314 (1987).) A claim for the "wrongful" taking of conversion is not identical to a "just compensation" claim for a proper exercise of public power. Unlike tort claims, which seek damages for the breach of a public duty, the aim of the takings doctrine is "not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." (*Id.* at p. 315, emphasis in original.)

As Moore's petition notes, "[n]o constitutional violation occurs until just compensation has been denied." (*Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 n.13 (1985).) However, where a California plaintiff has failed to follow the available state procedure for obtaining compensation, the claim must be dismissed as waived. (See *Cassettari v. Nevada County, Cal.*, 824 F.2d 735, 737-738 (9th Cir. 1987).) If Moore genuinely believed the University's conduct constituted a taking requiring just compensation, he fails to explain why no claim was made for inverse condemnation.[1] Instead, petitioner Moore sought to expand the common law tort of conversion. There are notable distinctions both as to the scope of possible defendants and the extent of possible damage claims between a claim of conversion and one for inverse condemnation; distinctions that were the subject of his election in seeking conversion and *not* condemnation. Obviously, Moore was more interested in claiming the results of the University's re-

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[1] "Where property has been taken or damage for public use without a condemnation proceeding, the owner may bring an action to obtain the just compensation which he is guaranteed by the state constitution . . . . An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemnor." (29 Cal.Jur.3d, Eminent Domain, § 302, pp. 450-451.)

search (by claiming a wrongful taking) than in just compensation for the surgically removed diseased tissue. That was the election he made.

Furthermore, as Moore's petition admits, his taking claim was not asserted until the California Supreme Court rendered its decision. He did *not* address the issue in the trial court, notwithstanding the University's assertion he had no property interest. He did *not* address the issue in the California Appellate Court, notwithstanding the trial court's dismissal of his complaint. Clearly, it was not a matter of his interest until an unfavorable final decision below. He admits as much by suggesting it was "unripe" at any earlier stage. But he is in error, having failed to follow the state procedure for obtaining just compensation, he made an irrevocable election waiving his takings claim.

CONCLUSION

Upon the reasons stated above, respondent The Regents of the University of California respectfully submit there is no important question of federal law raised in the California Supreme Court decision denying Moore's claim for a state common law conversion cause of action. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a taking claim under the federal Constitution is property reviewable by this Court when the claim was not properly raised in, and was not passed upon by, the state court whose judgment is sought to be reviewed.

2. Whether a state court judgment is properly reviewable by this Court under 28 U.S.C. § 1257(a) when the judgment remands the case for further proceedings which may result in factual determinations which eliminate the federal question on which review is sought.

3. Whether a patient whose excised body tissue is used in state-sponsored medical research has a valid claim against the state under the United States Constitution for the taking of his property without just compensation, on the ground that he did not expressly authorize the research.

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Respondent David W. Golde, M.D. respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the California Supreme Court in this case.

JURISDICTION

The Court lacks jurisdiction in this matter because (1) the federal question on which review is sought was not adequately raised and was not passed upon in the state courts and (2) the state court judgment sought to be reviewed is not final within the meaning of 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

In 1976 petitioner sought specialized treatment at the University of California at Los Angeles Medical Center for hairy-cell leukemia, a rare blood disorder. Pet. App. 2a. Respondent Golde, a UCLA research physician and professor of medicine, recommended that petitioner's spleen be removed, and the operation was performed in October 1976. *Id.* at 3a. The spleen was grossly enlarged, and the splenectomy improved petitioner's condition. *Id.* at 14a n. 11. Petitioner does not assert that the splenectomy was not appropriate medical therapy, nor does he claim Golde acted out of any improper motive in recommending the operation. Petitioner did not state at the time of the operation any objection to the use of the excised tissue in medical research.

Following the splenectomy, Golde and other UCLA researchers studied the leukemia cells (T-lymphocytes) from petitioner's spleen. Sometime before August 1979, Golde established a cell line from T-lymphocytes from the spleen. *Id.* at 4a.[1] Later, UCLA researchers determined that the cell line produced enhanced quantities of certain lymphokines, or proteins found in the human body which regulate the immune system. *Id.* at 4a n. 2. Eventually, it was discovered that the cell line was infected with a virus which, when applied to normal human T-lymphocytes from individuals other than petitioner, caused the cells to overproduce the same lymphokines. *Id.* at 4a n. 2, 23a n. 30.

In 1981, respondent Regents applied for a patent on the cell line, the lymphokines produced by it, and methods of purifying the lymphokines and producing them synthetically using genetic engineering techniques. *Id.* at 4a-5a; Clerk's Transcript (C.T.) 342-56. The patent issued in 1984. Pet. App. 5a. The same year, petitioner filed suit in the Superior Court of California, alleging conversion, lack of informed consent, breach of fiduciary duty, and ten other tort and contract claims under state law. *Id.* at 6a.

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[1] A cell line is an immortalized cell culture capable of reproducing indefinitely. Pet. App. 4a n. 2. As compared with primary cells (cells taken directly from the body) cell lines have enhanced growth properties and other abnormal characteristics. *Id.* at 26a n. 35. Establishing cell lines is difficult and, except for a few types of cells not involved in his case, the probability of success is low. *Id.* at 4a n. 2.

Petitioner's complaint alleged that at the time his spleen was removed, Golde and other respondents had formed the intent to study the spleen cells and to try to establish a cell line from them.[2] *Id.* at 105a-106a. Petitioner further alleged that if he had been informed of respondents' intent he would not have consented to the splenectomy, would have insisted on controlling the use of the cells to ensure that they would be "made available to other research facilities and entities expert in such matters," and "would have sought to participate in the economic and financial benefit" from the research. *Id.* at 109a. He also alleged that he "owned" not only the spleen cells, but the cell line established by Golde, the lymphokines produced by it, and the chemical sequences of the genes for the lymphokines. *Id.* at 102a, 128a. Finally, petitioner alleged that his "damages" included the cell line, its products, the "patents, licenses, profits, inventions, genetic sequences," and all other valuable results of respondents' research activities. *Id.* at 130a. Although petitioner's complaint was amended three times, at no time did the complaint assert any claim under federal law. In fact, petitioner asserted that his complaint "does not raise issues which 'arise under' the Constitution, laws or treaties of the United States." C.T. 193.

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[2] Petitioner inaccurately asserts that the complaint alleged respondents determined the spleen cells were "valuable" before the operation. Pet. 3. In fact, the complaint alleged only that respondents knew that "certain" blood components of "certain" patients could prove to be valuable. Pet. App. 104a. Petitioner specifically declined to allege that respondents knew anything of commercial value might be obtained from petitioner's spleen tissue at the time it was removed. C.T. 982-83, 1045-49.

The superior court dismissed petitioner's suit based in part on his failure to allege that respondents knew anything of commercial value might result from their research at the time the tissue was removed. C.T. 982-83. Petitioner appealed to the California Court of Appeal. Again, petitioner failed to assert any claim based on federal law. The court of appeal concluded petitioner had stated a cause of action for conversion, and declined to decide the other issues in the case. 215 Cal. App. 3d 709, 249 Cal. Rptr. 494 (1988).

Respondents petitioned the California Supreme Court to review the case. In his answer to the petitions, petitioner again failed to raise any issue of federal law. The supreme court granted review and petitioner for the first time asserted in his brief on the merits, without any significant discussion, that respondents' conduct violated the Due Process Clause of the federal Constitution. Pet. App. 97a. Petitioner did *not* assert in his brief the claim under the Just Compensation Clause which he seeks to raise in this Court.[3] The supreme court held petitioner had stated a cause of action for lack of informed consent or breach of fiduciary duty, but not conversion. The court concluded petitioner had no property interest in the excised tissue under state law, and declined to extend the

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[3] Petitioner inaccurately represents to the Court that he did assert his just compensation claim in his brief in the California Supreme Court. Pet. 11. In fact, as the excerpt of that brief printed in petitioner's appendix makes clear, petitioner argued *only* that respondents' actions constituted a deprivation of a property interest without due process, in violation of the federal *Due Process* Clause. Pet. App. 97a.

law to create such an interest. The court did not discuss petitioner's belated constitutional claim. 51 Cal. 3d 120, 793 P.2d 479, 271 Cal. Rptr. 146 (1990). Finally, in a petition for rehearing, petitioner raised for the first time the just compensation claim on which he now bases his petition for certiorari. Pet. App. 100a.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Federal Question on Which Petitioner Seeks Review Was Not Properly Raised, and Was Not Passed Upon, in the State Courts.

A fundamental jurisdictional requirement for review by this Court of a state court decision is that the federal question on which the petitioner seeks review must have been adequately presented to the state courts in the first instance. *Street v. New York*, 394 U.S. 576, 582 (1969). As the Court said in *Street*, "If the question was not so presented, then we have no power to consider it." *Id.*

Here, petitioner first asserted his "taking" claim in his petition for rehearing in the California Supreme Court. Pet. App. 100a.[4] The claim was not passed upon by that court.[5] This Court has repeatedly stated that "when

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[4] See footnote 3, *supra*.

[5] The court noted that an opposing party had suggested that the law of eminent domain might apply to the case, but found it unnecessary to decide that issue in view of its conclusion that petitioner retained no ownership interest in his diseased cells following their removal from his body. Pet. App. 36a n. 44. The court observed that the argument had not been presented to the lower courts. *Id.*

. . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York, supra,* 394 U.S. at 582; *accord, Exxon Corp. v. Eagerton,* 462 U.S. 176, 181 n. 3 (1983); *Fuller v. Oregon,* 417 U.S. 40, 50 n. 11 (1974).

To preserve a federal question for review by this Court, a party must timely raise it in the state courts in compliance with the procedural rules of those courts. *Beck v. Washington,* 369 U.S. 541, 549-52 (1962). California Rule of Court 29(b)(1) provides that, as a matter of policy, the California Supreme Court normally will not consider "any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal." The supreme court has repeatedly declined to reach issues not raised in compliance with this provision. See, *e.g., Estate of MacDonald,* 51 Cal. 3d 262, 267 n. 4, 794 P.2d 911, 272 Cal. Rptr. 153 (1990); *Henning v. Industrial Welfare Com.,* 46 Cal. 3d 1262, 1280-81 n. 1, 762 P.2d 442, 252 Cal. Rptr. 278 (1988); *Molko v. Holy Spirit Assn.,* 46 Cal. 3d 1092, 1111 n. 13, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied* 109 S. Ct. 2110 (1989). Similarly, California Rule of Court 28(e) requires that all issues proposed for review by the California Supreme Court be set forth in the petition for review or the answer to it, and that "[o]nly the issues set forth in the petition and answer or fairly included in them need be considered by the court." Again, the court has declined to consider issues not raised in compliance with the rule. See, *e.g., People v. Calio,* 42 Cal. 3d 639, 643 n. 4, 724 P.2d 1162, 230 Cal. Rptr. 137 (1986).

Petitioner did not assert his "taking" argument in his brief in the California Court of Appeal, nor did he include it in his statement of issues presented for review in his answer to the petitions for review in the California Supreme Court. Under *Beck, supra,* he has waived any right to review in this Court. *See also Exxon Corp. v. Eagerton, supra,* 462 U.S. at 181 n. 3 (declining to consider federal issue raised for the first time in brief before state supreme court, where general practice of state appellate courts was not to consider issues raised for first time on appeal).

Petitioner contends, however, that he is relieved of the requirement of having raised the federal issue below by this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985). Pet. 13 n. 14. He argues that under *Williamson County,* his federal taking claim did not "ripen" until the California Supreme Court finally ruled he had no valid claim under state law for conversion. Therefore, according to petitioner, he was not required to raise the federal question in the state courts at all, and his attempt to raise it in the California Supreme Court was actually premature. *Id.* at 13-14 n. 14.

In *Williamson County* this Court held that a federal taking claim is not ripe until the property owner has sought and been denied just compensation through the procedures the state has provided for doing so. 473 U.S. at 194-95. Since in *Williamson County* state law allowed a property owner to bring an inverse condemnation action to obtain just compensation for an alleged taking, the Court held the owner could not bring an action under 42 U.S.C. § 1983 for a taking under the federal Constitution

until it had availed itself of the state procedure. *Id.* at 196-97. However, the Court did not hold that in the course of pursuing its state inverse condemnation remedy the owner could not also assert its claim that a failure to award the relief it sought would amount to a taking without just compensation in violation of the federal Constitution. Indeed, since *Williamson County* involved review of federal court rather than state court proceedings, the Court had no occasion to consider the question of the appropriate procedure for preserving a federal taking claim in state court.

The Court did consider this question two years later in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). In that case, a property owner brought suit in the Superior Court of California for inverse condemnation, seeking damages for an alleged regulatory taking. The trial court dismissed the claim for damages on the ground that California case law did not permit an inverse condemnation action based upon a regulatory taking. Although the complaint had invoked only the California Constitution, the owner argued on appeal to the California Court of Appeal that the rule of state law denying inverse condemnation as a remedy in cases of regulatory taking violated the United States Constitution. *Id.* at 313 n. 8. The Court of Appeal rejected the argument and affirmed the dismissal. The California Supreme Court denied review.

On the owner's appeal to this Court, the Court considered (1) whether the owner's claim for compensation under the federal Constitution was ripe for review and (2) whether that claim had been properly preserved in the state courts. The Court concluded the claim was ripe

under *Williamson County, supra,* since the owner had sought and had been denied compensation from the state by filing its inverse condemnation action and having the action dismissed. 482 U.S. 312 n. 6. At the same time, the Court concluded that since the owner had concurrently raised the federal constitutional argument in the California Court of Appeal, where it was rejected, and had preserved the question on appeal to the California Supreme Court, the issue had been properly preserved for review in this Court. *Id.* at 313 n. 8.

If petitioner were correct that *Williamson County* obviates the need for raising the federal issue in the state courts, then this Court's discussion in *First English* of whether the federal issue had been properly preserved for review would be superfluous. Instead, the Court simply would have held that whether the federal claim had been raised in the state court was irrelevant.

Similarly, in *Peduto v. City of North Wildwood,* 878 F.2d 725 (3d Cir. 1989), property owners sued in state court for inverse condemnation based on an alleged temporary taking of their property without compensation. In their state court suit, the owners concurrently asserted claims under the federal Constitution and under state law. The state court, addressing the federal claims at length, dismissed the action. The owners then sued in federal court, asserting the same federal claims. The Third Circuit held the federal action was barred by the adverse state court judgment. *Id.* at 728-29. Again, if petitioner's interpretation of *Williamson County* were correct, the Third Circuit's decision in *Peduto* would be erroneous. Under petitioner's view of the law, the Third Circuit should have held that the owners' attempt to assert their "unripe"

federal claims in state court was premature and that the state court judgment rejecting those claims was therefore void for want of jurisdiction and, as such, was no bar to the litigation of the claims in federal court.

Finally, in at least two decisions predating *Williamson County*, this Court assumed that the traditional requirement that a federal claim be properly raised in state court to be reviewable by this Court applied to a taking claim under the federal Constitution. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n. 5 (1980); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 n. 5 (1980). Once again, if petitioner's interpretation of *Williamson County* were correct, the Court's discussion in these cases of whether the federal question had been presented adequately in the state courts would be superfluous.

These authorities demonstrate that, contrary to petitioner's contention, a federal taking claim, even though it is not ripe for review in federal court until the state court denies compensation under state law, not only can be but must be raised in the state court which is deciding the claim for compensation under state law. If the state court concludes that state law does not provide a right to compensation, it must then decide whether such a right is compelled by federal law. If it denies compensation, and if the denial is affirmed by the highest court of the state, the federal question properly can be reviewed by this Court. Since petitioner failed to follow the required procedure, his petition should be denied.

2. The Judgment of Which Petitioner Seeks Review is Not a Final Judgment Within the Meaning of 28 U.S.C. § 1257(a) Because It Contemplates Further State Court Proceedings Which May Render Moot Petitioner's Purported Constitutional Claim.

Under 28 U.S.C. § 1257(a), this Court may review by writ of certiorari "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." Since only final judgments may be reviewed, a judgment of the highest state court remanding the matter for further state court proceedings is generally not reviewable, at least where the outcome of the further proceedings may affect or render moot the issue of federal law which the Court is asked to review. In *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 311 (1987), for example, the Court observed that in several earlier cases it had declined to review, on the ground of lack of finality, issues arising from alleged takings of property without just compensation in violation of the federal Constitution where "factual disputes yet to be resolved by state authorities might still lead to the conclusion that no taking had occurred."

In this case, the California Supreme Court ordered that the trial court sustain, without leave to amend, the demurrers to petitioner's cause of action for conversion. However, the court's ruling did not finally dispose of petitioner's remaining claims. Pet. App. 36a-37a. Specifically, the court ordered that Golde's demurrer to the causes of action for breach of fiduciary duty and lack of informed consent be overruled (Pet. App. 36a), meaning that on at least those claims petitioner may attempt to

establish his case on the merits. The finder of fact in the state court thus will be required to determine whether Golde in fact failed to obtain petitioner's informed consent to the removal of his diseased spleen.

Where the government's use of property is done with the owner's consent, there is no taking under the fifth amendment. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), this Court held that an applicant for registration of a pesticide could not claim a "taking" of data voluntarily submitted by it to the Environmental Protection Agency. The Court stated, "[A]s long as Monsanto is aware of the conditions under which the data are submitted, . . . a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking." *Id.* at 1007; *see also Albers v. County of Los Angeles*, 62 Cal. 2d 250, 265-66, 398 P.2d 129, 42 Cal. Rptr. 89 (1965) (owner who consents to construction of public improvement on his property cannot recover under taking clause of state constitution for damage reasonably incident to the construction).

Similarly, the constitutional right to compensation for the taking of property can be lost if a claim of ownership is not asserted in an appropriate manner. In at least two decisions, this Court has upheld, against fifth and fourteenth amendment "taking" challenges, statutes providing that a mineral interest shall lapse unless the owner files a claim with the government within a specified time period. *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982); *United States v. Locke*, 471 U.S. 84, 107 (1985). As the Court said in *Texaco*, "[J]ust as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable

conditions that indicate a present intention to retain the interest." 454 U.S. at 526; *see also Dunscombe v. Loftin*, 154 F.2d 963, 967 (5th Cir. 1946) ("Even though the owner of property taken for public use has the right to receive just compensation for such property, the owner may waive that constitutional right . . . ").

Here, the trier of fact may ultimately determine that petitioner knew of and consented to UCLA's use of his excised spleen tissue. It may also determine that, even if he did not consent, petitioner knew of the intended use and waived his claim of ownership by failing to assert it in an appropriate fashion. Since either finding would be fatal to petitioner's fifth amendment claim, there may ultimately be no federal issue presented in this case and petitioner's request for review should be denied.

3. Petitioner Has No Valid Taking Claim Under the United States Constitution.

This Court has recognized repeatedly that, for purposes of the Just Compensation Clause, "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . . " *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 499 U.S. 155, 161 (1980); *Texaco, Inc. v. Short*, 454 U.S. 516, 525 (1982). Accordingly, where a party asserts a property interest claimed to be protected by the Constitution, "the sufficiency of the claim of entitlement must be decided by reference to state law." *Bishop v. Wood*, 426 U.S. 341, 344 (1976) (footnote omitted) (Due Process Clause). And where a state court concludes no property interest exists under state law, "it is the province

of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis." *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944). If it does, "this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court." (*Id.*)

In this case, the California Supreme Court concluded, under state law, that petitioner had no property interest in his excised spleen tissue sufficient to support a tort claim for conversion. Pet. App. 36a. Petitioner cannot show that the California court's decision lacked a "fair or substantial basis" (*Demorest, supra*). To the contrary, the reasons articulated by the California court for concluding petitioner had no property interest for purposes of conversion also compel the conclusion that he has no such interest for purposes of the Just Compensation Clause.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives . . . .

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); *accord, Webb's Fabulous Pharmacies, supra*, 449 U.S. at 161. Accordingly, to support a taking claim, a claimant must show a government interference with interests that are "sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978).

The California Supreme Court correctly recognized that petitioner "clearly did not expect to retain possession of his cells following their removal." Pet. App. 19a. Therefore, petitioner could only establish a property right if he could show he retained an ownership interest in the cells after their removal. *Id.*[6] The court concluded that petitioner lacked any continuing ownership interest under state law. Among other authorities, the court referred to California Health and Safety Code section 7054.4, which provides that

> [n]otwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any

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[6] Petitioner asserts, inaccurately, that the court "agreed that petitioner possessed a property interest in his bodily substances prior to their extraction." Pet. 14. In fact, the court recognized that the law deals with human biological materials as objects *sui generis, not* as property. Pet. App. 20a. It is one thing to acknowledge that individuals have a de facto right of possession and control over materials which are part of their bodies. It is another thing entirely to assert that this right means the materials are "property" on which a fifth amendment claim can be predicated. To the contrary, bodily materials lack the attributes ordinarily associated with property. Statutes governing organ donation typically prohibit the sale of body parts. See, e.g., 42 U.S.C. § 274e(a); Cal. Health & Saf. Code § 7155. Most bodily materials have no intrinsic monetary value, while, as petitioner himself acknowledges, property is that "upon which it is practicable to place a money value." Pet. 19, quoting *Yuba River Power Co. v. Nevada Irr. Dist.*, 207 Cal. 521, 523, 279 P. 128 (1929). And no one would seriously assert that petitioner's creditors could execute on his body as his "property" to satisfy a judgment against him. *See First Victoria Nat. Bank v. United States*, 620 F.2d 1096, 1103 (5th Cir. 1980).

> other method determined by the state department [of health services] to protect the public health and safety.

Pet. App. 24a. The court concluded that "one cannot escape the conclusion that the statute's practical effect is to limit, drastically, a patient's control over excised cells" and that "the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to 'property' or 'ownership' for purposes of conversion law." *Id.* at 25a.[7]

It is instructive to contrast this case with the recent decision of the Sixth Circuit in *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. January 18, 1991). The majority in that case held that a decedent's widow who had expressly declined to authorize an anatomical gift of his body parts could sue under 42 U.S.C. § 1983 for the county coroner's removal of the decedent's corneas for anatomical gifts. The court looked to Ohio law to determine whether the

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[7] Petitioner argues that the issue here is "whether petitioner is entitled to compensation for the taking of his bodily materials *for* scientific and commercial use, not whether petitioner retains an unrestricted right to dominion and control *after* the State has finished exploiting the commercial potential of the material." Pet. 15 (emphasis in original). The answer, of course, is that under the decisions of this Court discussed above, it cannot be determined whether compensation is required for a taking until it is determined that "the challenged government action . . . interfere[d] with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Penn Central Transp. v. City of New York, supra*, 438 U.S. at 124-25. As the California Supreme Court correctly recognized, section 7054.4 negates any such "reasonable expectations."

widow's interest in the decedent's corneas rose to a "legitimate claim of entitlement" protected by the Due Process Clause.[8] The court concluded that since state law recognized the right of a surviving spouse to possession of the decedent's body for purposes of preparation, mourning, and burial, "Ohio does grant that right which resides at the very core of a property interest: the right to possess." That right, in combination with the right granted to the widow under the Ohio Uniform Anatomical Gift Act to control the disposal of the decedent's body, rose to the level of a legitimate claim of entitlement protected by the Due Process Clause and required predeprivation process.[9]

In this case, in contrast, the highest court of the state has determined that petitioner had no legitimate expectation under state law of a right of possession of his cells following their removal. Pet. App. 19a. Not only does state law not grant such a right, the court recognized it would be inconsistent with section 7054.4. Pet. App. 19a n. 20.

For these reasons, the California Supreme Court correctly concluded that petitioner had no reasonable expectation of continued ownership of his cells after their removal. The court further held that petitioner had no legitimate interest in the immortalized cell line derived

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[8] No taking claim was asserted in *Brotherton*.

[9] One judge dissented, concluding that the limited rights granted under Ohio law did not amount to a property interest under the Constitution.

from the excised cells, or the biological products of the cell line. The court recognized that, despite petitioner's conclusory allegation that he "owned" those materials, as well as the genetic sequences contained in them, the patented cell line was legally and factually distinct from the cells taken from petitioner's body.[10] The court held that, since naturally occurring raw materials cannot be patented, the patented cell line was by definition distinct from the tissue from which it was derived. Pet. App. 27a. Moreover, the court observed that federal patent law precludes petitioner's claim of ownership of the subjects of the patent, since petitioner does not meet the statutory criteria for inventorship. *Id.* at 27a-28a n. 37.

For the same reasons, petitioner has no valid claim under the Constitution for the value of the cell line and its products as compensation for the alleged "taking" of his spleen tissue. In giving content to the Just Compensation Clause, "this Court has sought to put the owner of condemned property 'in as good a position pecuniarily as

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[10] Petitioner argues, without the citation of any authority, that the California court's reference to judicially noticed scientific material in reaching this conclusion was done "in violation of California law and basic notions of fairness." Pet. 10 n. 10. As this Court has recognized, however, California law expressly permits a court in ruling on a demurrer to make reference to judicially noticed facts. *Agins v. City of Tiburon*, 447 U.S. 255, 259 n. 6 (1980). Golde requested in his opening brief that the court judicially notice the referenced material. Although petitioner claims he "was never afforded an opportunity to submit to the court his own views on the persuasiveness of the materials on which the court relied" (Pet. 10 n. 10), he has identified no reason why he could not have done so in his own brief.

if his property had not been taken.' " *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979). Here, had petitioner's spleen not been removed and studied by respondents, there would have been no cell line and thus no value for petitioner to attempt to claim. "Since the owner is to receive no more than indemnity for his loss, *his award cannot be enhanced by any gain to the taker.*" *United States v. Miller*, 317 U.S. 369, 375 (1943) (emphasis added; footnote omitted). "[I]t is the owner's loss, not the taker's gain, which is the measure of compensation. . . . [T]he sovereign must pay only for what it takes, not for opportunities which the owner may lose." *United States v. Powelson*, 319 U.S. 266, 281-82 (1943). "That the 'taker' may reap a profit above and beyond the value of the property interest taken does not entitle the person from whom the property is taken to share in those profits." *Carroll v. State Bar*, 166 Cal. App. 3d 1193, 1204, 213 Cal. Rptr. 305, *cert. denied* 474 U.S. 848 (1985).[11]

The Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980); *accord, Penn Central Transp. Co. v. City of New York*, 438 U.S. 104,

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[11] Indeed, petitioner's formulation of his alleged "expectation" that he could "reap a reasonable return" for the commercial use of the spleen tissue (Pet. 19) begs the question by ignoring the fact that, at the time the tissue was removed, there was no reason to suspect any monetary return could be derived from it. Thus, petitioner could not "reasonably" have expected any monetary compensation when he decided to undergo the operation.

123 (1978). The determination of when "justice and fairness" require that compensation be paid "depends largely 'upon the particular circumstances' " of the case. *Penn Central, supra,* at 124. In particular, the Court has upheld government conduct "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted" by the challenged action. *Id.* at 125.

In this case, the California Supreme Court recognized that "[r]esearch on human cells plays a critical role in medical research." Pet. App. 31a. The court concluded that recognizing a right to sue for conversion would obstruct research by making each cell sample "the potential subject matter of a lawsuit." *Id.* at 31a-32a. The same would be true if petitioner's attempted federal taking claim were recognized. Any patient whose excised tissue was the subject of research by any governmental entity could assert a similar claim.[12]

In the context of patent law, this Court has recognized repeatedly that "encouragement of individual

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[12] Since the Just Compensation Clause only requires compensation for public takings, recognition of a taking claim in this context would lead to the anomalous result that government entities would be liable for using tissue even though private organizations using the same tissue would not. For this reason, petitioner's suggestion that this Court should grant review to insure uniformity among the laws of the various states (Pet. 21) is misplaced; with respect to private entities, state tort law will continue to govern in any event. As discussed later, a more sensible solution would be legislative resolution of the issues involved, perhaps in the manner of the Uniform Anatomical Gift Act.

effort by personal gain is the best way to advance public welfare . . . . " *Mazer v. Stein*, 347 U.S. 201, 219 (1954). "The productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy . . . . " *Diamond v. Chakrabarty*, 447 U.S. 303, 307 (1980). Accordingly, patent law offers "an incentive to inventors to risk the often enormous costs in terms of time, research and development." *Kewanee Oil Company v. Bicron Corporation*, 416 U.S. 470, 480 (1974). Recognition of petitioner's taking claim would interfere with this incentive by making governmental inventors such as Golde and Quan pay damages to parties, such as petitioner, who have made no such investment of time or effort.[13]

Finally, as this Court has observed, important policy decisions require "the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." *Diamond v. Chakrabarty, supra*, 447 U.S. at 317. The policy questions raised by petitioner's taking claim are ill-suited to judicial resolution. In the absence of legislative guidance, the Court should not recognize liability which creates more problems than it solves.

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[13] For this reason, petitioner's attempted analogy to cases recognizing a "right of publicity" (Pet. 19) fails. As this Court has observed, the policy underlying the right of publicity is to provide "an economic incentive . . . to make the investment required to produce a performance of interest to the public." *Zacchini v. Scripps – Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977). The right protects "the product of [a person's] own talents and energy, the end result of much time, effort, and expense." *Id.* at 575. It was respondents' effort, not petitioner's, which created the value petitioner now seeks to recover.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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In The

Supreme Court of the United States

October Term, 1990

JOHN MOORE,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, DAVID W. GOLDE, M.D., SHIRLEY G. QUAN,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of California

RESPONDENT SHIRLEY G. QUAN'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, on a petition for writ of certiorari to the Supreme Court of California, this Court has jurisdiction to address a claim that the petitioner's bodily tissue is property that was taken by the state without just compensation in violation of the Fifth Amendment, when that question was neither properly raised in nor decided by the state court.

2. Whether, on a petition for writ of certiorari to the Supreme Court of California, there is a final judgment providing this Court with jurisdiction to address a claim that the petitioner's bodily tissue is property that was taken by the state without just compensation in violation of the Fifth Amendment, when the California Supreme Court: (a) remanded the case to the trial court for, *inter alia*, an evidentiary hearing which will determine whether the petitioner gave a fully informed consent to any alleged taking of his bodily tissue; and (b) held that the allegations in petitioner's complaint that respondents conspired with one another to remove his bodily tissue without his consent are deficient and must be amended upon remand of the case to the trial court.

3. Whether the Supreme Court of California's determination that there is no property interest in excised human tissue rests on a fair and substantial basis, precluding a claim for just compensation under the Fifth Amendment Takings Clause, when: (a) a contrary determination would deter vital medical research; and (b) a patient's rights can be protected through a state law claim for breach of fiduciary duty.

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No. 90-1037

In The

Supreme Court of the United States

October Term, 1990

JOHN MOORE,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, DAVID W. GOLDE, M.D., SHIRLEY G. QUAN,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of California

RESPONDENT SHIRLEY G. QUAN'S BRIEF IN OPPOSITION

Respondent Shirley G. Quan respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of California entered on July 9, 1990 in this case. That opinion is reported at 51 Cal.3d 120, 271 Cal. Rptr. 146, 793 P.2d 479 (1990).

STATEMENT OF THE CASE

Petitioner John Moore ("Moore"), who was gravely ill with a condition known as hairy cell leukemia, sought treatment from respondent Dr. David W. Golde ("Golde"), a physician employed by respondent the Regents of the University of California ("the Regents") at the Regents' U.C.L.A. Medical Center. In order to save Moore's life, Golde recommended a splenectomy, i.e., the removal of his spleen. Golde requested the surgical team to provide him with a portion of Moore's excised spleen. He then directed respondent Shirley G. Quan ("Quan"), a medical researcher employed by the Regents at the U.C.L.A. School of Medicine, to conduct studies on that tissue.[1] Those studies eventually lead to the development of a cell line from Moore's excised tissue which may prove beneficial to other patients suffering from similar ailments. The Regents thereafter applied for a patent on that cell line, listing Golde and Quan as co-inventors.

When Moore learned of the existence of the cell line, he instituted an action in California state court against the Regents, Golde, Quan and various pharmaceutical companies. He purported to allege state court claims for, *inter alia*, conversion and breach of fiduciary duty based on respondents' alleged failure to disclose that one of their purposes in removing his spleen was to have access to it for nontherapeutic purposes. All causes of action were predicated on Golde's alleged duty, as Moore's treating physician, to fully disclose the purposes of

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[1] Contrary to the assertion in the petition (Pet. 3), Moore never alleged that Golde and Quan had determined prior to the operation that his cells were unique and extremely valuable.

proposed medical procedures. Because Quan was not a physician and therefore had no personal duty to obtain Moore's informed consent, liability against her was predicated on allegations she conspired with Golde to obtain his bodily tissue without providing full disclosure. None of Moore's claims asserted any right under the United States Constitution or any federal statute.

The trial court sustained respondents' demurrers to Moore's complaint with leave to amend and, when he declined to amend, dismissed the action. The California Court of Appeal reversed, ruling that Moore had a property interest in his excised bodily tissue and that he had adequately alleged a cause of action for conversion under state law. The California Supreme Court granted review and affirmed in part and reversed in part the decision of the California Court of Appeal. It held:

1. Moore could maintain a cause of action for breach of fiduciary duty against Golde, his treating physician, if he could prove at trial that Golde failed to inform him of Golde's research and economic interests before obtaining Moore's consent to the removal of his bodily tissue;

2. Moore's allegations that the remaining defendants, including Quan, conspired with Golde and were therefore also liable for breach of fiduciary duty, were "egregious examples of generic boilerplate" and required amendment before Moore could go to trial against those defendants on his breach of fiduciary duty claim; and

3. Moore could not state a cause of action for conversion because he did not possess a property interest in his excised tissue under existing California law and

compelling public policy considerations counseled against extending California law to recognize a property interest in such tissue.

The California Supreme Court remanded the case to the trial court for further proceedings consistent with its opinion.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THIS COURT IS WITHOUT JURISDICTION TO ADDRESS MOORE'S JUST COMPENSATION CLAIM BECAUSE IT WAS NEITHER RAISED IN NOR DECIDED BY THE STATE COURT.

This Court has repeatedly held that unless a federal question has been properly "raised and decided" or "pressed or passed upon" in the state court it will decline to address that issue, as either a matter of jurisdiction or as a prudential restriction. *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. ___, ___, 108 S.Ct. 1645, 1651 (1988); *Illinois v. Gates*, 462 U.S. 213, 218-19 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); 28 U.S.C.A. § 1257(a) (West Supp. 1990). "It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.' " *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987) (quoting *Webb v. Webb*, 451 U.S. 493, 496-97 (1981)). The policy reasons for this longstanding rule – comity to the states and practical considerations including a need for a properly developed record on appeal, *see Webb v. Webb*, 451 U.S. at 500-01;

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-35 (1940) – apply with special force when, as here, "difficult issues of great public importance are involved."[2] *Illinois v. Gates*, 462 U.S., at 224; *see also Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. at ___, 108 S.Ct. at 1651.

"Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 512 n. 7 (1978); *see also Parker v. North Carolina*, 397 U.S. 790, 798 (1970); *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 313 n. 6 (1968), as explained in Justice Harlan's dissent, at 334-36 ("[W]hen a defendant has failed to comply with such a rule [regarding the preservation of an issue in state court] 'the argument cannot be entertained here under an unbroken line of precedent' "); *Edelman v. California*, 344 U.S. 357, 358-59 (1952).

"[W]hen . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can

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[2] As we illustrate in section III, *infra*, Moore's Fifth Amendment claim raises a difficult issue of great public importance. That claim requires a finding that Moore possessed a property interest in a cell line created from his excised tissue. However, the recognition of a property interest in that cell line would have disastrous effects on medical research, as innocent medical researchers could then be held liable for conversion if they conducted research on bodily tissue which had been removed from a patient without his or her informed consent.

affirmatively show the contrary." *Street v. New York*, 394 U.S. at 582; *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. at 550; *Webb v. Webb*, 451 U.S. at 496. Here, Moore acknowledges that the California Supreme Court failed to pass on the applicability of the Fifth Amendment. *See* Pet. 13 n. 14. As we show, the assumption the California Supreme Court did not address that issue because it had not been properly presented in conformity with California law is confirmed by the record.[3]

First, Moore failed to argue in opposition to respondents' demurrers to his complaint in the trial court that the alleged conversion of his bodily tissue and fluids constituted a taking of his property without just compensation.[4] The California appellate courts " 'will ordinarily not consider . . . erroneous rulings . . . where an objection could have been but was not presented to the lower court by some appropriate method. . . . ' " *Doers v. Golden Gate Bridge etc. Dist.*, 23 Cal.3d 180, 184-85 n. 1, 151 Cal.Rptr. 837, 838-39 n. 1, 588 P.2d 1261 (1979). Moore's failure to

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[3] In fact, the California Supreme Court expressly refused to address Sandoz Pharmaceutical Corporation's contention the Regents took Moore's cells pursuant to the power of eminent domain, noting, *inter alia*, that Sandoz had failed to raise the issue in the lower courts. 51 Cal.3d at 147-48 n. 44; Pet. App. 36a n. 44.

[4] Indeed, Moore's state court complaint did not allege his property had been taken without just compensation. *See* Pet. App. 101a-148a. The failure to include such an allegation in his complaint precludes this Court from considering his Fifth Amendment claim. *Jones v. Hildebrandt*, 432 U.S. 183, 186, 189 (1977); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50 (1959); *Louisville & N. R. Co. v. Woodford*, 234 U.S. 46, 51 (1914).

raise this issue in the trial court therefore precluded its consideration by the California Court of Appeal.

Second, Moore did not argue in his briefs in the California Court of Appeal that his property had been taken without just compensation (*see* Res. App. 69a-226a) and he failed to raise that contention as an additional issue presented for review in his answer to the petitions for review in the California Supreme Court (*see* Res. App. 239a-242a). Nor was the issue raised in any of the petitions for review. *See* Res. App. 227a-238a. The California Supreme Court therefore could not consider the issue. *See* CAL. R. CT. 29(b)(1) ("As a matter of policy, on petition for review the [California] Supreme Court normally will not consider: (1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal"); CAL. R. CT. 28 ("(5) . . . The answer of a party opposing review may request the court to consider additional issues if review is granted as to any or all issues raised in the petition. An answer stating additional issues shall conform to the requirements of paragraph (2)").[5]

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[5] Moore contends he advanced his just compensation claim in his answer brief on the merits in the California Supreme Court. Pet. 11, 13-14. Not so. In that brief, Moore made only a cursory, isolated assertion that his property had been taken without due process of law, not that it had been taken without just compensation. Pet. App. 97a. Moreover, even if Moore had argued in his brief in the California Supreme Court that he had been deprived of his property without just compensation, the California Supreme Court could not have considered the claim given his failure to raise it in either his briefs in the California Court of Appeal or in his answer to respondents' petitions for review. CAL. R. CT. 28(5), 29(b)(1).

Third, Moore's assertion of the just compensation issue for the first time in his petition for rehearing in the California Supreme Court was untimely. Under California procedure, contentions raised for the first time in a petition for rehearing will not be considered. *People ex rel. Dept. of Public Works v. Mascotti*, 206 Cal.App.2d 772, 780, 24 Cal.Rptr. 679, 680 (1962); *City of San Marino v. Roman Catholic Archbishop*, 180 Cal.App.2d 657, 679, 4 Cal.Rptr. 547, 561 (1960). The California Supreme Court's denial of Moore's petition for rehearing without comment confirms that his assertion of the Fifth Amendment issue was untimely under California procedure and precludes this Court from considering his claim. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1944).

Moore's contention he was not required to raise his Fifth Amendment claim until the California Supreme Court held he could not maintain a state law conversion action is without merit. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), cited by Moore for this remarkable proposition, holds no such thing. In *Williamson*, the successor-in-interest to a land developer contended that a county planning commission had taken its property without just compensation by refusing to approve a proposed development on the land. This Court held only that the just compensation claim was not "ripe" for adjudication until the developer had unsuccessfully utilized the state's inverse condemnation procedure in an effort to seek compensation for any alleged taking.

Williamson does not change the settled rule that this Court will not address a federal question that has not been pressed or passed upon in state court. Although a

federal constitutional claim may not be ripe for adjudication until a litigant has been denied relief under state court procedures, the litigant is not relieved of the obligation to raise his or her constitutional claim at the outset of the state court proceedings, so that the issue may be passed on by the state court in the event it denies relief under state law.

Thus, even where, as in *Williamson*, a state has a recognized procedure for seeking just compensation for the taking of property, this Court has consistently refused to address federal issues until it has first satisfied itself that they had been properly raised in the course of the state court proceedings. Accordingly, in *Bailey v. Anderson*, 326 U.S. 203, 205-07 (1945) this Court found it had no jurisdiction to consider a just compensation claim which had not been raised in a state court condemnation proceeding. It stated:

> Appellant . . . insists that the state court judgment failed to include in the award interest from the date of the occupation of his land by appellee; that the award thus denied to him just compensation for the land taken, in violation of the due process clause of the Fourteenth Amendment. . . . Appellant's petition in the [state] court asked that the award include interest from the date of taking. The [state] court, without explanation, rejected his claim for interest. But throughout the proceedings in the [state] court appellant made no claim to interest on constitutional grounds, and made no attack on the constitutionality of the award or the court's decree because of the asserted denial of interest. . . . Appellant, for the first time, assailed on constitutional grounds the asserted denial of interest by his assignments of error in the State Supreme

> Court of Appeals. . . . Inspection of the record does not show that, in denying the writ of error, the state court passed upon any constitutional question not raised or passed upon in the course of the proceedings below . . . Unless this affirmatively appears upon the record brought here for review on appeal, this court is without jurisdiction of the appeal.

See also First Lutheran Church v. Los Angeles County, 482 U.S. 304, 313 n. 8 (1987) (jurisdiction to hear Fifth Amendment claim found where, even though state court inverse condemnation suit invoked only state constitution, property owner raised federal just compensation claim in state court of appeal, which addressed claim on merits. "Having succeeded in bringing the federal issue into the case, appellant preserved this question on appeal to the Supreme Court of California, . . . which declined to review its Agins decision. Accordingly, we find that the issue urged here was both raised and passed upon below"); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n. 5 (1980) (jurisdiction to consider Fifth Amendment just compensation claim found where the claim had been raised and considered by state supreme court).

The need to first raise the Fifth Amendment just compensation claim in state court was particularly compelling under the facts of this case. From the inception, respondents argued Moore could not state a cause of action for conversion because he did not possess a property interest in his excised tissue.[6] Res. App. 24a-28a.

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[6] *Cf. Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (no dispute that the

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Moreover, no prior state court decision had sanctioned a conversion action based on the misappropriation of excised human tissue. 51 Cal.3d at 137; Pet. App. 19a. Given the uncertainty whether Moore even possessed a state law remedy, he should have raised his just compensation claim at the outset of the state court proceedings, thereby affording the state courts the opportunity to address that claim in the all-too-likely event his state law conversion claim would be rejected. Because he failed to give the state courts the opportunity to pass on that claim, it is too late for Moore to now ask that it be considered by this Court.

Indeed, because this Court's " 'only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights' " (*Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981)), it is difficult to determine why Moore contends the judgment of the California Supreme Court is erroneous. Even if Moore had asserted in his briefs in the California Court of Appeal and the California Supreme Court that he had been deprived of his property without just compensation (he did not), the fact remains that his complaint purported to allege only causes of action under state tort law. Because the California Supreme Court is the final arbiter of state tort law, its determination that Moore had failed to allege a cause of action for conversion under state law (the only issue it

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developer had a property interest in its real property or that an owner of real property could bring an inverse condemnation action to obtain just compensation for the taking of that property).

could decide given the allegations of his complaint) is not subject to review by this Court. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977) (this Court has no jurisdiction to correct a judgment which rests on an "independent and adequate state ground"). The California Supreme Court had no occasion to adjudicate, correctly or incorrectly, Moore's federal rights because he never purported to allege a cause of action based on the United States Constitution or a federal statute.

II.

BECAUSE THE CALIFORNIA SUPREME COURT REMANDED THE CASE TO THE LOS ANGELES COUNTY SUPERIOR COURT FOR FURTHER PROCEEDINGS, THERE IS NO FINAL DECISION WHICH CAN BE REVIEWED BY THIS COURT.

Under 28 U.S.C.A. § 1257(a) this Court has jurisdiction to review only "[f]inal judgments or decrees." This statute has generally been interpreted " 'to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.' " *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. at 124). The finality requirement "serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art[.] III [7];

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[7] As this Court explained:

It has long been this Court's "considered practice not to decide abstract, hypothetical or contingent

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[and] (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota Pharmacy Bd. v. Snyder's Store*, 414 U.S. 156, 159 (1973).

Here there is no final judgment because the California Supreme Court reversed the trial court's ruling on defendants' demurrers, in part, and remanded the case for further proceedings.[8] *See, O'Dell v. Espinoza*, 456 U.S. 430 (1982) (no final decision where Colorado Supreme Court remanded case for trial); *Gospel Army v. Los Angeles*,

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> questions, or to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . . " *Public Workers v. Mitchell*, 330 U.S. 75, 90 n. 22; *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 510 (1975) (Rehnquist, J., dissenting).

[8] The California Supreme Court issued the following directions:

> The case is remanded to the Court of Appeal, which shall direct the superior court to: (1) overrule Golde's demurrers to the causes of action for breach of fiduciary duty and lack of informed consent; (2) sustain, with leave to amend, the demurrers of the Regents, Quan, Sandoz, and Genetics Institute to the purported causes of action for breach of fiduciary duty and lack of informed consent; (3) sustain, without leave to amend, all defendants' demurrers to the purported cause of action for conversion; and (4) hear and determine all defendants' remaining demurrers. 51 Cal.3d at 148; Pet. App. 36a-37a.

331 U.S. 543, 546 (1946) (no final judgment where California Supreme Court reversed and remanded case for a new trial); *Missouri & K.I.R. Co. v. Olathe*, 222 U.S. 185, 186 (1911) (no final judgment where Kansas Supreme Court's decision sustaining demurrer did not preclude amendment to petition); *Cincinnati S. R. Co. v. Snell*, 179 U.S. 395, 397 (1900) ("a judgment reversing a case and remanding it for . . . further proceedings of a judicial character, is totally wanting in the requisite finality required . . . "); *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 610 (1892) (no final judgment where Minnesota Supreme Court affirmed an order overruling a demurrer).

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, this Court identified four discrete categories in which a state court's determination of a federal issue has been treated as a final judgment even though further proceedings are mandated in the lower state court.[9] Moore does

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[9] The four categories established by *Cox* are:

(1) "[C]ases in which there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479.

(2) Cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decisions regardless of the outcome of future state court proceedings." *Id.* at 480.

(3) Cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review

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not suggest this case fits into any of those categories and none appears applicable. Indeed, further proceedings in the trial court will resolve at least two crucial issues upon which Moore's just compensation claim depends.

First, Moore's just compensation claim is predicated on the allegation respondents failed to inform him of their research and economic interests when they obtained his consent for removal of his bodily tissue. Therefore, on the remand directed by the California Supreme Court, the trial court must determine whether Moore knew of those interests and consented to the removal of his tissue notwithstanding that knowledge. If he did, no unconstitutional taking would have occurred and any opinion by this Court would be advisory. *See San Diego Gas & Elec. v.*

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ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." *Id.* at 481.

(4) Cases "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.* at 482-83.

City of San Diego, 450 U.S. 621, 633 (1981) (finding "further proceedings are necessary to resolve the federal question whether there has been a taking at all" and concluding the lower court's decision was not final); *see also Minnick v. California Dept. Of Corrections*, 452 U.S. 105, 127 (1981) (finding "because of significant developments in the law – and perhaps in the facts as well – and because of significant ambiguities in the record . . . we conclude that we should not address the constitutional issues until the proceedings in the trial court are finally concluded and the state appellate courts have completed their review of the trial court record") (footnote omitted).

Second, Moore's claim against Quan depends on his ability to establish she conspired with Golde to remove Moore's bodily tissue without his informed consent. (Only Golde, Moore's treating physician, was authorized and obligated to inform him of the purposes of the medical procedures performed on him.) However, in remanding the case to the trial court, the California Supreme Court held that Moore's complaint had to be amended (51 Cal.3d at 148; Pet. App. 36a-37a) because his conspiracy allegations against Quan are "egregious examples of generic boilerplate. . . . [¶] Nowhere in the third amended complaint does Moore specifically allege that any defendant other than Golde knew that Moore had not received adequate disclosures." 51 Cal.3d at 134 n. 12; Pet. App. 14a-15a n. 12. If, following the remand to the trial court, Moore is unable to correct the deficiencies in his complaint identified by the California Supreme Court, any decision by this Court regarding Quan's potential liability

under the Fifth Amendment Takings Clause would be advisory only.[10]

III.

THE PETITION SHOULD BE DENIED BECAUSE THERE WAS A FAIR AND SUBSTANTIAL BASIS FOR THE CALIFORNIA SUPREME COURT'S CONCLUSION THAT MOORE DID NOT HAVE A PROPERTY INTEREST IN HIS EXCISED TISSUE.

Moore has no claim under the Fifth Amendment Takings Clause unless he possessed a property interest in his excised tissue. However, "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 161, quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see also Bishop v. Wood*, 426 U.S. 341, 345 (1976) (the existence of "an enforceable expectation of continued public employment," a property right, was determined by state law). The California Supreme Court's determination that Moore did not have a property interest in his excised tissue must be upheld so long as it rests on a "fair and substantial basis." As this Court

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[10] Moreover, Moore's failure to satisfy state procedural rules regarding the allegation of a conspiracy constitutes an adequate and independent state ground for the California Supreme Court's decision which precludes review by this Court. *Michigan v. Tyler*, 436 U.S. at 512 n. 7; *Parker v. North Carolina*, 397 U.S. at 798; *Edelman v. California*, 344 U.S. at 358-59.

explained in *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944):

> [T]he [state] Court of Appeals disposed of their cases on the ground that appellants have never possessed under New York law such a property right as they claim has been taken from them. If this is the case, appellants have no question for us under the Due Process Clause. . . . "[I]t is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. . . . [I]f . . . the nonfederal ground of decision has fair support, . . . this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court." (footnote omitted).[11]

Citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, Moore argues that the California Supreme Court

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[11] In *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), the Sixth Circuit applied these principles in the course of addressing a plaintiff's 42 U.S.C. § 1983 claim that a county coroner removed her deceased husband's corneas without due process and in violation of the Equal Protection Clause. (The plaintiff did not make a just compensation claim.) To resolve the issue, the Sixth Circuit looked to state law, explaining that "[t]o determine whether [plaintiff's] interest in her husband's corneas rises to the level of a 'legitimate claim of entitlement' protected by the due process clause, we must examine the laws of the state of Ohio. . . . State supreme court decisions are the controlling authority for such determinations." The Sixth Circuit concluded that the plaintiff's right under state law to dispose of her husband's body was a "legitimate claim of entitlement" protected by the Due Process Clause. Here, however, the California Supreme Court held Moore had no legitimate expectation of a right to possession of his bodily tissue following its removal.

impermissibly refashioned state property law to deny him compensation to which he would otherwise be entitled under the Fifth Amendment Takings Clause. Moore's argument begs the question. *Webb's* held only that *once* a private property interest is recognized by the state, it is protected by the Fifth Amendment Takings Clause. Specifically, in *Webb's* the state attempted to avoid paying just compensation for the taking of accrued interest on interpleader funds by recharacterizing the principal as "public money" because it was temporarily held by the court. This Court rejected the attempt, holding that " 'a state by *ipse dixit*, may not transform private property into public property without compensation.' " *Id.* at 164; *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1985) ("While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, *once conferred*, without appropriate procedural safeguards." (emphasis added)); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property, the Court has emphasized, is an individual entitlement *grounded in state law*, which cannot be removed except 'for cause.' " (emphasis added)).

These decisions have no application here because the California Supreme Court found there was no property interest in excised bodily tissue under existing California law (51 Cal.3d at 136-42; Pet. App. 18a-28a),[12] and refused

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[12] " 'To establish a conversion, plaintiff must establish an actual interference with his *ownership or right of possession* . . . . Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot

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to expand California law to create a hitherto nonexistent property right in such tissue. 51 Cal.3d at 142-47; Pet. App. 28a-36a. The California Supreme Court's conclusion that there is no property interest under state law is entitled to deference by this Court. *See Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97, 111 (1980) ("[T]his Court accords 'respectful consideration and great weight to the views of the state's highest court' on matters on state law"). Although Moore denigrates the California Supreme Court's analysis as lacking a "substantial basis in either logic or law" and resting on "obvious *non sequiturs*" (Pet. 14), he fails to even mention the public policy considerations relied upon by that court to support its decision. However, those considerations are significant and compelling and establish that the California Supreme Court's conclusion rests "upon a fair and substantial basis." *Demorest v. City Farmers Trust Co.*, 321 U.S. at 42.

Specifically, the California Supreme Court explained that recognition of a property interest in excised bodily tissue would have a devastating effect on medical research because it would "threaten with disabling civil liability innocent parties who are engaged in socially

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(Continued from previous page)

maintain an action for conversion.' " 51 Cal.3d at 136; Pet. App. 18a. The California Supreme Court expressly noted that the Uniform Anatomical Gift Act, Cal. Health & Safety Code § 7150, et seq., relied on by Moore to support his contention he had a property interest in his excised tissue, does not permit the donor of a transplantable organ to receive "valuable consideration" for the transfer. Cal.Health & Safety Code § 7155 (West Supp. 1990); *see* 51 Cal.3d at 137 n. 22; Pet. App. 19a n. 22.

useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor's wishes." 51 Cal.3d at 143; Pet. App. 29a. This is so because under state law, conversion of property is a strict liability tort in which questions of good faith, lack of knowledge and motive are ordinarily immaterial. 51 Cal.3d at 144 n. 38; Pet. App. 30a n. 38. Therefore, a finding that excised tissue was property "would impose liability on all those into whose hands the cells come, whether or not the particular defendant participated in, or knew of, the inadequate disclosures that violated the patient's right to make an informed decision." 51 Cal.3d at 144; Pet. App. 30a-31a. Under Moore's theory, "with every cell sample a researcher purchases a ticket in a litigation lottery. Because liability for conversion is predicated on a continuing ownership interest, 'companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists'. . . . In our view . . . '[i]t is not unreasonable to conclude in these circumstances that the imposition of a harsher test for liability would not further the public interest in the development and availability of these important products.' " 51 Cal.3d at 146; Pet. App. 33a-34a.

Moreover, the California Supreme Court explained that "there is no pressing need to impose a judicially created rule of strict liability since enforcement of physician's disclosure obligations will protect patients against the very type of harm with which Moore was threatened." 51 Cal.3d at 147; Pet. App. 35a-36a. "Liability based upon existing disclosure obligations, rather than an

unprecedented extension of the conversion theory, protects patients' rights of privacy and autonomy without unnecessarily hindering research." 51 Cal.3d at 144; Pet. App. 30a.

In short, the California Supreme Court did not, by *ipse dixit*, refashion state property law to deprive Moore of an established property interest – it decided, on the basis of settled law and sound public policy considerations, that there was not and should not be a property interest in excised tissue. Because the California Supreme Court's decision rests on a fair and substantial basis, it is not subject to review by this Court.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 90-1037

In The

Supreme Court of the United States

October Term, 1990

JOHN MOORE,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, DAVID W. GOLDE, M.D., SHIRLEY G. QUAN,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of California

APPENDIX TO RESPONDENT SHIRLEY G. QUAN'S BRIEF IN OPPOSITION

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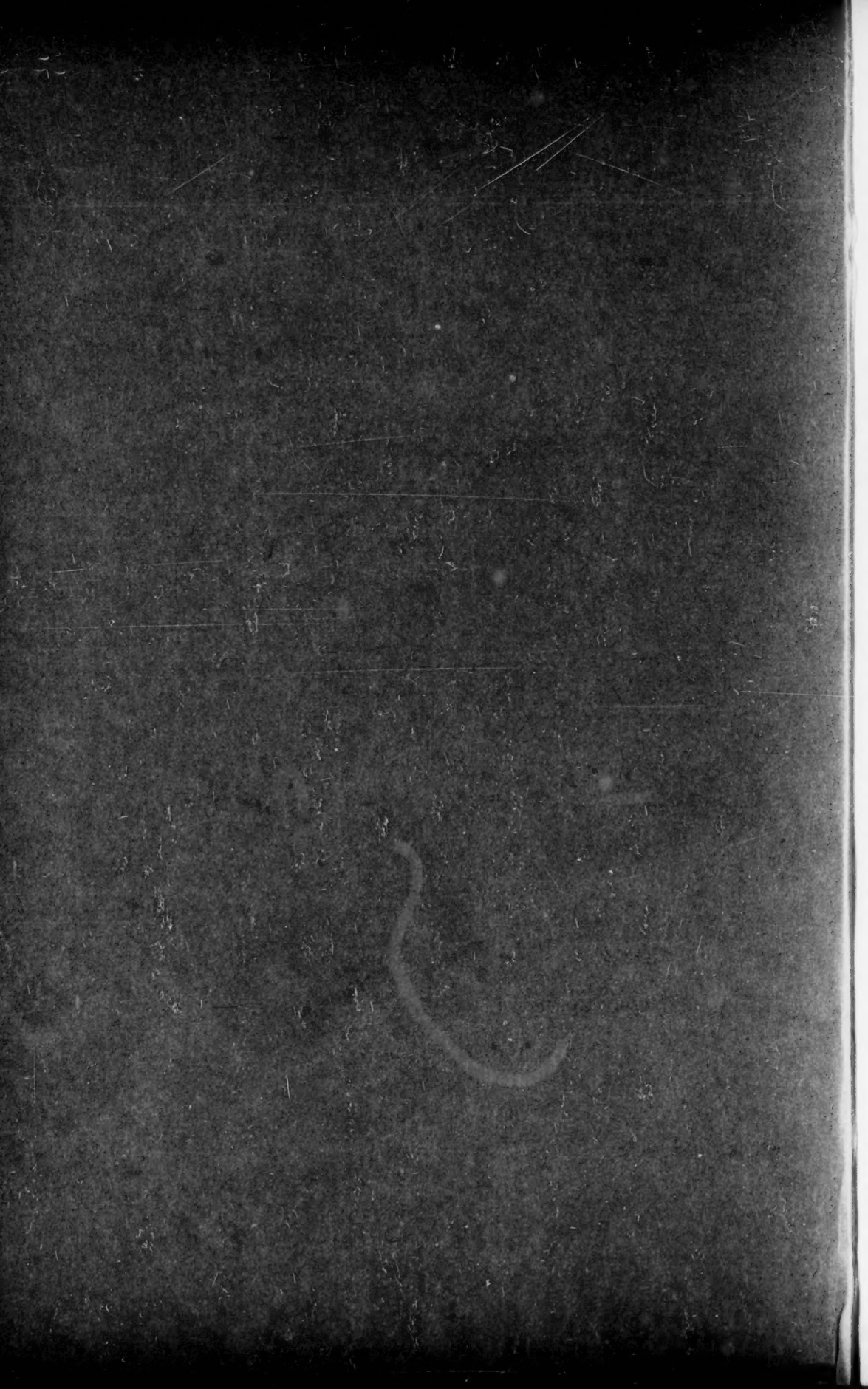

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FOR THE COUNTY OF LOS ANGELES

JOHN MOORE, Plaintiff, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants.	Case No. C513755 Date: December 10, 1985 Time: 9:00 a.m. Dept: 83 Trial Date: None Set

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3 Witkin, Cal. Procedure (2d ed. 1971) Pleading § 564 et seq., pp. 2203-2206 18

4 Witkin, Summary of California Law, (8th ed. 1974) Torts §§ 354, 356 and 357, pp. 2614-2616 27

In support of their demurrers to plaintiff's Third Amended Complaint[1], The Regents of the University of California (herein "Regents"), its Professor of Medicine, physician-scientist David W. Golde (herein "Golde"), and its Laboratory Technician Shirley G. Quan (herein "Quan"), herein collectively referred to as "defendants" or "University," submit the following statement, points and authorities.

I. SUMMARY OF ARGUMENT

After an extraordinary amount of discovery[2], conducted by and at the request of plaintiff's counsel over the course of the past twelve months, and after three prior demurrers by defendants, plaintiff now files his Third Amended Complaint. While there is considerably more factual material alleged in this version of his pleading, plaintiff has *not* modified his material allegations in any substantial manner. Plaintiff's complaint remains unresponsive to the matters of concern raised by this Court during defendants' demurrers to the First and Second Amended Complaint versions. As with its predecessors, this latest version of the complaint is a confusing morass of equivocal half statements that simply do not

---

[1] Herein occasionally abbreviated TAC.

[2] Including: Golde's deposition, Quan's deposition, the deposition of The Regents' Custodian of Records, 40 pages of Answers to Interrogatories and the production of approximately 50,000 pages of documents. (See Attached Declaration of Wagner.)

allege a claim against defendants. While the standard for testing a pleading by demurrer assumes the truth of the draftor's allegations, where those allegations are equivocal and uncertain they must be interpreted against the draftor. So construed, and viewed in the context of its precedent versions, the Third Amended Complaint describes the following story.

Sometime in September 1976, plaintiff's physician in Alaska diagnosed him to have a blood cancer – "hairy-cell leukemia" (TAC ¶6). Plaintiff then came to the University of California Los Angeles Medical Center and sought "an additional opinion" concerning his condition (TAC ¶7) from Professor David W. Golde, who allegedly was "a renowned and internationally famous author, scientist, researcher and inventor" (FAC[3] ¶2). Professor Golde confirmed the Alaskan physician's diagnosis and recommended the surgical removal of plaintiff's spleen ("splenectomy" as the indicated treatment (TAC ¶12). Plaintiff consented to the therapeutic treatment (TAC ¶19) and on or about October 20, 1976, his spleen was surgically removed (TAC ¶22). Over a period of approximately seven years following his operation, Dr. Golde recommended plaintiff's return visits for further medical attention (TAC ¶30). Except for the first month (during which three visits occurred) those visits were slightly more frequent than annually comprising nine occasions in nearly seven years (*Ibid*). During these visits plaintiff consented to the withdrawal of specimens of his blood and other substances for the purpose of his medical care

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[3] First Amended Complaint abbreviated "FAC" herein.

(TAC ¶31) and on at least two occasions expressly for the purpose of defendants' research (TAC ¶¶42, 44, 46 and 48).

The several versions of plaintiff's complaint are all equivocal regarding plaintiff's awareness of the University's research interest and intention. On the one hand, plaintiff alleged: his awareness of Professor Golde's fame as an "author, scientist, researcher and inventor" (FAC ¶2); his awareness "at all times relevant herein," that he and his disease "were of scientific curiosity and academic interest" to defendants (OC[4] ¶7); and, that "throughout his treatment" he was aware and inquired about defendants' research (TAC ¶35). Yet, plaintiff complains he was not informed, did not know, and did not consent to any alleged "research *and* commercial" activities involving the result of the University's research.

Plaintiff does *not* allege defendants *knew* of any particular research or possible commercial value prior to the splenectomy. At most, he alleges defendants were in a better position to speculate about possible commercial utility of yet unknown research results (TAC ¶¶8, 9 and 10). Plaintiff admits research occurred with his expressed as well as tacit consent (TAC ¶¶35, 44 and 48). And he alleges *no* "commercial" activity until 1980 (TAC ¶41(h)), over three years after his 1976 splenectomy. After extensive discovery in this case, plaintiff does not, for indeed he could not, allege defendants had any knowledge of "commercial" utility of their research prior to the August 1979 report of possible patentable invention (TAC ¶41(f)) and after the several years of intervening research. Now

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[4] Original Complaint abbreviated "OC" herein.

that plaintiff has learned that the research involving a specimen of his therapeutically excised tissue resulted in a patentable advancement of medical science, that the University's research continues, and that some commercial entities have been given some of those research results in order to explore potential utility for the public benefit, plaintiff brings this action claiming some right, title or interest not only to the patent, but to all the knowledge and understanding brought about by that research.

As with the Second Amended Complaint, plaintiff's carefully drafted Third Amended Complaint: does *not* claim any medical malpractice or other professional negligence; does *not* deny the alleged representation that defendants' purpose *always* included his care, health and treatment (pathologic or diagnostic); does *not* deny that the substances withdrawn under a representation of medical care, were in fact used for his care, health, and treatment for pathologic or diagnostic purposes; does *not* allege defendants knew, or could have known, of any speculative value to research involving his diseased spleen; does *not* deny that defendants obtained plaintiff's consent to research, when the substances withdrawn were beyond that necessary for his care, health and treatment; does *not* allege the exposure to any physical risk he did not consent to; does *not* allege the University's research activities were in any manner inconsistent with the care, health and treatment given plaintiff; and *still* does *not* disclose when and how he first became aware of the University's research activities.

In essence, plaintiff's complaint presents two issues:

1) May an academic medical research center conduct scientific studies upon a specimen of therapeutically excised (pathologic or diagnostic) tissue, *after* its therapeutic use, and relying upon the patient's informed consent to the medical treatment removal?

2) If not, must "consent" to such research include speculation of any value or commercial utility of the yet unknown research results?

By its demurrer, the University asserts that scientific research conducted at an academic medical research center upon a specimen of pathologic or diagnostic human tissue removed in the course of proper medical treatment, simply does *not* constitute a cause of action, or a wrong to plaintiff. The University further contends that its lawful possession of the tissue *ab initio* (whether as a result of consent to research *or* to medical treatment) constitutes appropriate dominion for its use in scientific research and for the disposition of any research results; and that plaintiff's silence coupled with his admitted awareness of the University's scientific curiosity and research interests constitues [sic] an implied abandonment of any interest he may have had. Finally, the University submits that "informed consent" serves the purpose of lawful access, and *not* a purpose of direction or control over the research or its results.

Plaintiff asserts a right of prior consent to any investigation involving therapeutically removed tissue, and a right of prior consent to the commercial utilization of any results of research, whether or not consented to. He asserts these rights as a matter of property interest in the

removed tissue, and as a fiduciary-type duty conditioning the University's scientific inquiry into that tissue. All his causes of action are, at least in part, dependent upon the existence of such a property interest or such a duty, and are either redundant or remedial to them. And, that includes the alleged fraud (vested property interest) and deceit (duty to disclose) cause of action. The University has been unable to find *any* prior case establishing such a property interest or such a duty.

Where a complaint asserts a claim for which *no* legal precedent has imposed a duty on defendants, the court may decide the case on public policy grounds, as well as related case law. And, if no duty exists, all the causes of action based on the alleged duty would fail without the need for detailed technical consideration of each. (*Kinner v. World Sav. & Loan Assoc.* (1976) 75 Cal.App.3d 724, 729, and 734.) Accordingly, the University's demurrer asks whether the undisclosed scientific inquiry using therapeutically removed tissue, or the non-disclosure that research results may have commercial utility, affronts "that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel is against public policy." (*Ibid.* at 729 [quoting *Safeway Stores v. Retail Clerks, etc. Assoc.* (1953) 41 Cal. 2d 567, 574, which quoted *Storey, Contracts*, § 546].)

In opposing plaintiff's Third Amended Complaint, the University submits:

1) That plaintiff has not satisfied the concerns raised by this Court in sustaining defendants' demurrers to the First and Second Amended Complaints.

2) That significant public policy precludes plaintiff's claim of property in his therapeutic tissue, or the results of the University's research upon it. (Examined under the "Conversion" cause of action.)

3) That "consent" to research should not, and could not, include consent to speculative value or commercial utility of yet unknown research results. (Examined under the "Informed Consent," "Fiduciary Duty" and "Fraud and Deceit" causes of action).

4) That significant public policy precludes plaintiff's claim that the University's scientific inquiry into therapeutic tissue was conditioned by a duty to obtain his consent prior to that inquiry. (Examined under the "Informed Consent" and "Fiduciary Duty" causes of action.)

5) That the Third Amended Complaint is subject to a statute of limitations bar disclosed on its face, and plaintiff's attempt to avoid that bar is insufficient and fails to demonstrate diligence.

6) That plaintiff has not alleged any appropriate injury or damage compensable under his property or duty theories.

7) That, in any event, the defendants, and each of them, are immune under the California Government Tort Claims Act from each cause of action, including fraud and deceit, since each relies upon a claim of negligent or intentional misrepresentation.

Plaintiff's claim of a *duty* must be balanced against the general need for medical research, the practical impossibility of disclosing what is unknown prior to the research, and the public policy considerations opposing

an intrusion into the physician-patient relationship of matters that are independent and irrelevant to the medical treatment and the physical risks associated with it. Plaintiff's claim of a *property expectancy* must be balanced against the public policy considerations opposing the "sale" of human tissue, and the public policy rewarding intellectual advancements expressed in the Federal Patent Law (prohibiting plaintiff's claim to the University's patent: *first*, for his lack of inventorship, and *second*, by the statutory provisions regarding patents from federally funded research). Moreover, plaintiff's claim demands the impossible, i.e., the disclosure of what is obviously unknown before the research is conducted. In so doing, plaintiff seeks to maintain a controlling interest in that research and its results. That claim opposes the significant public policy encouraging the University's research effort for the advancement of medical knowledge and technology for the public benefit, and would have a considerable chilling effect upon that research and the University's ability to freely disseminate that knowledge.

II. THE THIRD AMENDED COMPLAINT STILL DOES NOT SATISFY THE CONCERNS EXPRESSED BY THIS COURT IN SUSTAINING DEFENDANTS' EARLIER DEMURRERS.

In sustaining the defendants' demurrers to the First Amended Complaint, this Court held that the following material issues needed to be explicitly alleged:

1) Whether the removal of bodily tissue and substances was on each occasion for the purpose or including the purpose of care, treatment or diagnosis of plaintiff's ailment.

2) Whether plaintiff consented to the removal for purposes of care, treatment or diagnosis.

3) Whether such substances and tissues were in fact used by defendants for the purpose (among others) of care, treatment and diagnosis of plaintiff.

4) Whether plaintiff knew or reasonably should have known that defendants as part of said care, treatment or diagnosis would have conducted tests and other research on said substances and tissue.

5) Whether, if plaintiff had known the defendants' alleged true intentions, he would not have submitted himself to the removal or withdrawal of such substances and tissues for the purpose of said care, treatment or diagnosis by defendants.

The Third Amended Complaint still does not reply to the first or third above issues. It does *not* allege any tissue removal was absent a purpose that included the care, treatment or diagnosis of plaintiff's ailment, even on those occasions (April 11, and September 20, 1983) when he gave written consent for research withdrawals. Nor does he allege that the substances removed under a representation of care, treatment or diagnosis, were in fact *not* used for the stated purpose (among others). As to the spleen, the Third Amended Complaint, in this critical regard, carefully alleges that "after its removal," it was not used "in connection with his *actual* medical and health *care, treatment or diagnosis*" (TAC ¶24). He is silent on whether the removal was itself pathological. As to the subsequent blood and substance withdrawals, plaintiff dropped the reference to "diagnosis" (used with the spleen) and alleges that they were *not* used "to *further or*

improve plaintiff's health and well-being," or to assist in the "*actual* medical and health *care received*" (TAC ¶34). Again, plaintiff carefully avoids the obvious, that is, they were post-operative and continuing diagnostic tests. Other than those guarded allegations, the Third Amended Complaint (like the Second Amended Complaint before it) is mute on whether the defendants' *purposes* included plaintiff's care, treatment or diagnosis in the tissue removals, or separately, in their use. *Indeed,* plaintiff nowhere denies the truth of defendants' alleged representations that their purposes always *included* plaintiff's care and treatment (TAC ¶¶19, 30 and 48).

While the Third Amended Complaint seems to respond to the second and fifth above stated issues, it remains equivocal in several respects. On the second issue, plaintiff clearly admits consent to the splenectomy, for the purpose of his care, treatment and diagnosis (TAC ¶¶19 and 21). As to the subsequent substance withdrawals, plaintiff alleges defendants' representations of care, treatment, and diagnosis (TAC ¶30), but is unclear on what consent he gave for their withdrawal (TAC ¶31), except for his (written) consents to research given on April 11 (TAC ¶44), and September 20 (TAC ¶48), 1983. On the fifth issue (on how plaintiff would have acted had he known the defendants' alleged intentions), plaintiff remains obtuse. As to the splenectomy, he conditions his response to include not only knowledge of the intention to do research and the possibility of commercial utility of research results, but he further includes the hind sight [sic] knowledge of the research results. Had he known *all that,* then he would not have undergone the surgery for purely medical and health care purposes (TAC ¶26);

rather, he would have *"considered" his alternatives* (TAC ¶28), sought "control" over the research (TAC ¶27), and sought financial participation in any use of the research results (TAC ¶29). As to the subsequent substance withdrawals, the Third Amended Complaint is simply mute on how, if at all, plaintiff's conduct would have been different had he known of the defendants' alleged intentions, except for the April 11, and September 20, 1983 occasions. As to those latter occasions, plaintiff alleges *only* that he would have withheld his written consent to the research withdrawals (TAC ¶¶45 and 51). Plaintiff simply does *not allege* there would be *any difference* in his consent to the medical care and treatment given by defendants, except as noted above. Apparently, plaintiff consented to the medical treatment, and would, in all probability, not have done anything different, even if he did know of possible commercial activity.

The remaining point raised by the Court asked whether plaintiff "knew or reasonably should have known" that "tests and other research would be conducted" upon such removed substances. Again, plaintiff does *not* respond directly to the issue; *instead,* he conjunctively adds "commercial" to the "research" inquiry and alleges that he did not know or have cause to know of alleged "research *and* commercial activities" of defendants" (TAC ¶¶15, 33 and 49). Plaintiff's attempt to tuck and hide his awareness of "research" behind an unawareness of the University's technology transfer policy is transparently obvious by his standard denial of knowledge for the April 11, and September 20, 1983 removals (TAC ¶¶45 and 51) where he admits consent to the research (TAC ¶¶44 and 48).

Nowhere does plainiff [sic] deny that he knew, or reasonably expected that scientific testing and research would occur at the University. Indeed, he admits he knew of the research "throughout [his] care and treatment," and that "during *each* of [his] visits and withdrawals" he sought to inquire into "the nature, purpose and progress of the research," and was told it was "scientific medical research" (TAC ¶35). Moreover, Professor Golde is not alleged to be plaintiff's family physician, but rather an acknowledged and renowned research scientist at the University's academic medical research center (FAC ¶2), to which plaintiff came bearing his disease and hoping, no doubt, to capture interest for the benefit he would thereby receive. Plaintiff was aware, and had more than reasonable cause to know, that scientific testing and research would occur at the University. In *consciously* seeking medical treatment that would incorporate the most current state of the art research, did plaintiff not thereby *implicitly* consent to the procedures from which he sought to gain?

In sum, it appears that each tissue withdrawal was subject to a valid medical or research consent, purpose and use. It further appears that had plaintiff known the defendants' alleged full intention, he would still, in all probability, have consented to the recommended medical treatment. Finally, he knew research would be, and was being, conducted. Indeed, he expressly and tacitly consented to it.

In sustaining defendants' demurrer to the Second Amended Complaint, in addition to repeating its request for clarity on the above issues, this Court indicated several further concerns, including:

1) That there was a "commingling of alleged conduct by defendants . . . regarding the use of tissue after its removal as distinguished from the act of removal and their intent at the time it was removed." (TR[5] 6:8-14.)

2) That the pleading did not disclose "what the roles of the various defendants are." (TR 27:9-12.) Referring to Golde and Quan, "if one or both of those defendants played no role in the decision to remove tissue or bodily substances from plaintiff, they could not successfully be alleged to have had wrongfully done that." (TR 29:4-15.)

3) And, that the charge that defendants "misled" plaintiff "doesn't match up with the state of the pleadings at the present time, to the extent that they affirmatively told him one thing and did something else. Now, if that is a fact, it should be alleged." (TR 42:26-43:2.)

Plaintiff's Third Amended Complaint fails to respond to those specific requests. There is no distinction made between the defendants' intention in the act of removing plaintiff's spleen and the subsequent use of it after removal. Plaintiff does *not* allege any wrongful intent in that removal. He alleges an intent to scientifically study the diseased tissue after therapeutic removal, *and* a generalized awareness that research results might have some commercial utility. There is no allegation defendants knew that this particular research would have any such result. Indeed, how could defendants know of such, prior

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[5] "TR" designates "Reporter's Transcript of Proceedings" for the June 12, 1985 hearing on defendants' demurrer to the Second Amended Complaint.

to the splenectomy and any examination of the spleen! What plaintiff complains of is the University's failure to speculate about yet unknown research results.

Further, notwithstanding the extraordinary discovery permitted during this pre-pleading stage of the case, including the lengthy depositions of Golde and Quan, plaintiff still fails and refuses to distinguish between the conduct of the defendants. In particular, Shirley G. Quan is not the subject of *any* allegation other than her general description (TAC ¶3) as an employee of The Regents.

Finally, as discussed below (section VI), plaintiff's pleading still fails to allege how he was "misled" by any affirmative misrepresentation. Certainly, after this Court's admonition, if that were a fact – it would have been alleged. As stated during the earlier hearing:

> "THE COURT: You see, one of the problems – and I'm repeating myself, but it is important – with the second amended complaint and the first 50-odd paragraphs is that the court cannot determine, (a) did the patient understand that he was undergoing these tissue withdrawals, et cetera, as part of his care and treatment? (b) did the defendants or any of them at that time, the time of the withdrawal, or before, misrepresent to him that they were doing it for his care but were, in fact, not doing it for that purpose in any way but for some unrelated purpose, and when did those misrepresentations occur, if they occurred, either at the time of withdrawal or subsequent?
>
> Now, those are some of the things I think are going to have to be addressed in the complaint.
>
> MR. GAGE: Very well, Your Honor."

It is no longer "50-odd paragraphs;" it has become 70-odd paragraphs over 36 pages, with no greater explanation of what was said, when it was said, and how it misrepresented what, in fact, occurred, i.e., its falsity.

III. DEMURRER TO THE "CONVERSION" FIRST CAUSE OF ACTION

A. The Essential Averments of Conversion

There are three allegations necessary to state a cause of action for conversion: plaintiff's rightful possession or property interest; defendants' wrongful withholding or conversion; and plaintiff's damage. (*Franklin v. Municipal Court* (1972) 26 Cal.App.3d 884, 901; see generally, 3 Witkin, Cal. Proc. (2d ed. 1971), Pleading § 564 et seq., pp. 2203-2206.)

B. Plaintiff has no Property Interest in the Subject Matter.

1. Plaintiff has no Property Interest in Therapeutically Excised Human Tissue

Plaintiff claims a possessory or property interest in the pathologic and diagnostic tissue therapeutically removed during the medical treatment of his hairy-cell leukemia disease. Yet no statute or case law creating or granting a right of ownership to such tissue can be found. *To the contrary,* to protect public health, safety and welfare, California Health and Safety Code section 7054.4 expressly provides for the disposal of such tissue, *following scientific use:*

> "Notwithstanding any other provision of law, recognizable anatomical parts, human tissue,

> anatomical human remains, or infectious wastes *following conclusion of scientific use* shall be disposed of by interment, incineration, or any other method determined by the state department to protect the public health and safety." (Emphasis added.)

The State's expressed concern over public health and safety overrides plaintiff's desire to possess the diseased tissue.

Moreover, there is no provision in California statutory law for a "personal property" interest in parts of human beings. (Civ. Code, §§ 654 and 655.) Statutes such as the Uniform Anatomical Gift Act, enacted in California (Health & Saf. Code, § 7150 et seq.), provide for the transfer or organs by *gift*, as a *service*, not a product, to accredited medical schools or universities for education, research, advancement of medical science, therapy and transplantation. There is no provision for sale or purchase within that statutory scheme. Further, the recently enacted "National Organ Transplant Act" (42 U.S.C. § 274(e), P.L. 98-507 (Oct. 19, 1984) 98 Stat. 2339) reflects a strong national public policy against the sale or purchase of human organs by expressly prohibiting such sale and making any effort to do so a criminal offense. Thus there is no statutory right to transfer a possessory interest in parts of human beings, other than by gift or abandonment.

While California courts have recognized certain limited possessory interests in a decedent's body, for purposes of interment, it forms no part of an estate and is not "property" in any commercial sense. (*Sinai Temple v. Kaplan* (1976) 54 Cal.App.3d 1103, 1110; *O'Donnell v. Slack*

(1899) 123 Cal. 285, 289; *Enos v. Snyder* (1900) 131 Cal. 68, 69; *Gray v. Southern Pacific* (1937) 21 Cal.App.2d 240, 246.) Plaintiff's asserted ownership of his tissue is also without foundation in case law. As stated by the court in *Gray*:

> "The action is not one for conversion, nor could it be, as the law recognizes no right of property as such in the dead body of a human being." (21 Cal.App.2d at 246.)

Further, what form of property interest would there be for repugnant material such as diseased tissue? It is its removal and disposition that the patient seeks, not continued possession. In this case, the expressed provision of California Health and Safety Code section 7054.4, committing the disposition of the diseased tissue to the University, expressly contemplating *scientific use*, determines that rightful dominion exercised by the University. Plaintiff had no further possessory or property interest in that excised tissue.

There are several significant public policy considerations that support a determination that plaintiff had no property expectancy in the excised tissue. Such a property interest would predictably have a devastating effect upon patient medical treatment and research for the advancement of medical science. A premium would be placed upon illness and those suffering from diseases would only have their predicament compounded by a false expectancy of a windfall, as plaintiff here tries to assert. Yet, few research efforts actually produced commercial results, and when they do, such results are usually an amalgam of several separate efforts upon diverse materials over several years. It would be pragmatically impossible to determine what material or circumstance

stimulated the University's intellectual research curiosity into one direction, as opposed to some other. And, where a commercially useful product did occur, there would predictably be a string of lawsuits by those who, like the plaintiff, might anticipate a windfall from such an expectancy. Even if a prior agreement were made, they might seek to avoid their consent by an argument of *duress*, or dispute their percentage, or the management of the technology by the University. And just how would the "value" of such tissue be determined? The University's research is a matter of intellectual *curiosity* directed at the advancement of medical knowledge. There is no value to diseased tissue – only to curiosity.

Further, the current medical science community seeks an open exchange and transfer of biological materials for research purposes and, plaintiff's claimed "property expectancy" would have a chilling effect upon that exchange. Clouds of uncertainty would be cast upon all such gratuitous institutional transfers. Scientists, affected by such uncertainty, might find themselves limiting research alternatives such as the combining or re-combining of materials from different sources, as is done in the current hybridoma biotechnology.

Finally, the specter of taking human tissue, diseased or healthy, to the marketplace for barter to the highest bidder is repugnant to public policy and the public's interest, notwithstanding plaintiff's allegation he would do exactly that. No doubt some would point to the potential beneficial uses of any windfall profits, for example, an imporverished [sic] child's education, the downpayment for a home, or some such laudable goal. Nonetheless, one need only imagine an unfortunate patient

suffering from some disease, traveling from medical center to medical center to determine the value to be placed upon the examination of his diseased tissue, or the use of what remains as healthy tissue.

2. Plaintiff has no Possessory or Property Interest in Defendants' Patent

In *Diamond v. Chakrabarty* (1980) 447 U.S. 303, 307 [65 L.Ed.2d 144, 148], the Court noted the purpose and effect of the federal patent laws:

> "The Constitution grants Congress broad power to legislate to 'promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries.' Art. I, § 8, cl 8. The patent laws promote this progress by offering inventors exclusive rights for a limited period as an incentive for their inventiveness and research efforts. . . . "

The suggestion that patents are issued *only* to inventors is not new. Nearly one hundred years earlier, in *Thompson v. Boisselier* (1884) 114 U.S. 1, 10 [29 L.Ed. 76, 79] the Court, referring to the same constitutional provision stated:

> " . . . The beneficiary must be an inventor and he must have made a discovery. The statute has always carried out this idea. . . . "

The 1952 Patent Act (35 U.S.C. §§ 1-376) "carried out this idea" with its requirements: that the applicant be the inventor (35 U.S.C. § 102(f)); that applications be made under the authority of the inventor (35 U.S.C § 111); and,

that applicants file an oath asserting he/she is "the original and first inventor" of the invention (35 U.S.C. § 115, 116).

A patentable invention is comprised of both conception and reduction to practice. (35 U.S.C. § 102(g).) Plaintiff does not allege any participation in the conception or reduction to practice of the advancements that are the subject of this lawsuit. Thus plaintiff has no incipient right, title or interest in the granted or pending patents, for lack of inventorship participation. He is simply not the "beneficiary" to whom the patent laws are directed. *Nor* has he alleged any statutory basis for the transfer of any patent right to him, as for example by assignment or grant (35 U.S.C. § 261). And, as noted in *Gayler v. Wilder* (1850) 51 U.S. 477, 494 [13 L.Ed. 504, 511]:

> "[A patent] did not exist at common law, and the rights, therefore, which may be exercised under it cannot be regulated by the rules of the common law. It is created by the act of Congress; and no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes."

Thus plaintiff has no "property" right, title or interest in defendants' patent.

Furthermore, while patents are a species of property, their subject matter is intangible, not tangible. Contrary to plaintiff's assertion, the subject matter of the University's patent is not his tissue, but rather is limited to the advancements brought forth by defendant's research upon that tissue. As stated by the court in *Howes v. Great Lakes Press Corp.* (2d Cir. 1982) 679 F.2d, 1023, 1029:

> "Patents are not granted for the natural properties inherent in things existing in nature, although they may be granted for things an inventor does with those properties. . . . "

Thus, a mere discovery of what was inherent, or just unknown, is not patentable. *A patentable advancement must be both previously unknown and previously nonexistent.* (*Compare, Funk Bros. Co. v. Kal Co.* (1948) 333 U.S. 127 [92 L.Ed. 588], *with Diamond v. Chakrabarty, supra,* 447 U.S. 303 [65 L.Ed. 144].) While patentable subject matter includes "anything under the sun", it does so only to the extent it is *"made by man."* (*Chakrabarty, supra.*) Thus, the patent in question, presumed to be valid (35 U.S.C. § 282), reflects *only* the intangible results of the defendants' scientific study.

The circumstance is analogous to an artist's creation of a statue from abandoned or donated wood of a tree. A copyright arises in the artist for the work of art, *not* for the tree or its wood. The copyright affects the wood *only* to the extent the wood is a tangible expression or embodiment of the copyright's intangible subject matter. The nature of the subject matter produced by the artist (protected by copyright law) is the same as that resulting from the University's research (protected by patent law). The value associated with each (the artist's statue and the scientist's research) is awarded to the one creating the intangible subject matter. That is the purpose of the law's requirement that patents issue *only* to inventors and copyrights to artists or authors. There simply is and could be *no* patent issued upon plaintiff's "Blood or Bodily Substance."

Moreover, where the University's invention arises in the course of research conducted pursuant to a United States government research grant the national policy regarding the disposition of such patents is expressed in Title 35 of the United States Code. (35 U.S.C. §§ 200-211.) That statute mandates: the disclosure of all patentable inventions; the University's election to retain or to tender title to the Federal government; the prosecution of patent applications for those inventions retained; a prohibition against the assignment of any retained patent; and the disposition of any royalties derived therefrom, including a mandate to share such royalties with the inventors of the patented advancement. (35 U.S.C., § 202(a) and (c).) That federal policy was established to stimulate the utilization of technological advances derived from federal funding. Those statutory mandates do not contemplate, and indeed would prohibit, any interest of a materialman in the patented intangible advancements arising from federally sponsored research.

Finally, the intangible subject matter of a patent property is not that which can be converted since it is not tangible, nor is it represented in value by a tangible document, such as a stock certificate or bank account pass book (4 Witkin, Summary of California Law (8th ed. 1974), Torts §§ 354, 356 and 357, pp. 2614-2616.) There simply is no "possession" of a patent to be interfered with, other than an action for "infringement" as provided under federal patent laws. (35 U.S.C. § 271.) To the extent plaintiff has sought to do so, his claim for "conversion" of the patent is also contrary to the law for lack of any property interest in plaintiff.

3. There Is No Property Interest In Unpatented Knowledge

Other than as a patented advancement, there simply is *no* legally cognizable *property interest* in intangible knowledge or information derived from research. To the extent plaintiff seeks to claim "conversion" of any intangible knowledge beyond the patent, it is contrary to the law for lack of any "property" subject matter.

C. Defendants Did Not Unlawfully Withhold or Convert Property

As noted above, defendants' disposition and scientific use of the therapeutically excised tissue is expressly contemplated in California Health and Safety Code section 7054.4. Thus defendants have not unlawfully withheld or converted anyone's property.

D. Plaintiff Has Not Been Damaged

What damage does Moore claim? Does he seek the destruction or return of his excised tissue or the cessation of research? No, instead he claims the product of the University's years of research effort, which advanced medical knowledge and in the process produced patentable inventions. While plaintiff's disease and dilemma may have stimulated the University's intellectual curiosity, he does not thereby have a claim of a damage to the products of any resulting scientific inquiry.

Further, in the Third Amended Complaint, plaintiff alleges that defendants' research results were *not* derived

from any "scientific genius . . . nor were they created or *invented*," but were instead the results of routine activity (TAC ¶62). If so, where is plaintiff's damage? If the research results are not inventions, any patent upon them would be invalid.

And, if the patent is valid, plaintiff does *not* allege how it interferes with his ability to take his alleged "unique type of blood and/or blood components with unique genetic material, properties, and unique cells" (TAC ¶1) to *any* biotechnology firm he wishes, under any conditions he may arrange. Plaintiff may do as he pleases for the University's patent applies *only* to that which it invented (i.e., first conceived and actually reduced to practice). There is no legal basis for his alleged interference. Simply put, plaintiff has not been damaged and his allegations do not support any claim of damage.

E. In Any Event, Plaintiff's Claim for Conversion is Barred by the Statute of Limitations

Plaintiff's conversion allegations appear to involve his excised spleen tissue, removed in his October 1976 splenectomy, and his "Blood and Bodily Substances" withdrawn over the course of the following seven years to September 20, 1983. The California statute of limitations for conversion is three years. (Code Civ. Proc., § 338(3).) Assuming, without conceding, that a conversion of the spleen tissue had occurred, it occurred in October 1976, nearly eight years prior to the date plaintiff filed his complaint herein. Taken in the opposite direction, since the complaint was filed on September 12, 1984,

the plaintiff can only claim a conversion for activity that occurred on or after September 12, 1981.

Yet plaintiff claims an interest in all research results involving his therapeutic tissue removed since October 1976, including the Mo cell line and the defendants' patent. The application for the patent was originally filed January 30, 1981 (TAC ¶41(k)), based upon a University invention disclosure in August 1979 (TAC ¶41(f)), nearly two years beyond the statutory period. And certainly the material used in the research leading to the patent's subject matter and the Mo cell line must have, perforce, been accessed prior to the invention's disclosure or application date.

Plaintiff attempts to circumvent the statute of limitations bar by alleging that defendants deliberately and fraudulently concealed their true intentions for economic and commercial purposes. Apparently relying upon the equitable doctrine of estoppel, plaintiff previously argued that a defendant who, by his own wrongdoing, prevents a plaintiff from filing a complaint until after the limitations period has expired will be estopped from raising the statute of limitations as a defense. However, in order to use the excuse of fraud or fraudulent concealment by the defendant, plaintiff is required to plead not only the necessary elements for a fraudulent action[6], *but also*:

> "(1) When the fraud was discovered; (2) the circumstances under which it was discovered; and (3) that the plaintiff was not at fault for

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[6] Defendants assert plaintiff has not sufficiently alleged those elements necessary to a fraudulent cause of action (section VI, below).

> failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him on inquiry." (*Baker v. Beech Aircraft Corp.* (1974) 39 Cal.App.3d 315, 321.)

These allegations must be pled "clearly and unequivocally, and must not rest upon inferences." *Bank of America v. Williams* (1948) 89 Cal.App.2d 21, 25.)

In the Third Amended Complaint, plaintiff alleges he first discovered defendants' intent to obtain a patent for the commercial utility of its research results after the patent issued on March 20, 1984 (TAC ¶56); yet, he admits his awareness (and indeed, consent) to "academic" interest and "scientific medical research," "throughout [his] care and treatment" (TAC ¶35). Plaintiff further alleges that "during each of [his] visits" he sought to inquire whether any of his excised tissues had any "commercial or financial value of significance" (TAC ¶36). Having actual notice of the ongoing research, having consented to the research, and having continuously inquired about the value of his excised tissue as research material, plaintiff had *actual* and sufficient cause to be diligent in inquiring into the University's policies for the disposition of research results; unless, of course, plaintiff had no interest until the research produced meaningful results.

IV. DEMURRER TO THE "LACK OF INFORMED CONSENT" SECOND CAUSE OF ACTION

A. No Claim for Lack of Informed Consent Can Be Stated

Plaintiff's Second Cause of Action alleges that defendants had a duty to obtain his consent prior to any

scientific inquiry involving tissue removed it the course of his medical treatment, and that such consent must include discussion of speculative commercial utility of the yet unknown research results. Plaintiff admits his consent to surgery for his well-being and admits consent to research; but complains that his consent to research was not obtained *prior* to the splenectomy and that "informed consent" was not obtained for any commercial potential of the research results.

Plaintiff's reliance upon the doctrine of informed consent is misplaced. That doctrine exists to guarantee that medical patients and human experiment subjects would know the involved risks and choices regarding medical procedures, including experimental treatment. The history and policy of the doctrine of informed consent does not apply to information regarding the disposition of therapeutically excised tissue, including any research upon it or any potential commercial use of the research results. The informed consent doctrine promotes two values – personal well-being and self-determination.

The law has long protected an individual's physical integrity against unwarranted invasions. This concern for integrity led to the requirement that a doctor obtain the patient's informed consent before medical treatment is rendered. Around the turn of the century, a series of American cases held that medical treatment done without a patient's consent was an assault and/or battery. (*Mohr v. Williams* (Minn. 1905) 104 N.W. 12 (operation on both ears when patient consented to operation on right ear only); *Pratt v. Davis* (I[Il]. 1906) 79 N.E. 562 (total hysterectomy without consent); *Rolater v. Strain* (Okla. 1913) 137 P.96 (removal of bone from foot notwithstanding patient's

expressed disapproval); *Schloendorff v. Society of New York Hospitals* (1914) 211 NY 125, 104 N.E. 92 (removal of tumor although patient consented only to a diagnostic procedure).) However, it was not until 1972 that the informed consent doctrine had a major effect on the health care field. (*Canterbury v. Spence* (D.C. Cir. 1972) 464 F.2d 772; *Cobbs v. Grant* (1972) 8 Cal.3d 229.) In *Canterbury*, an uniformed patient was paralyzed after a laminectomy. In *Cobbs*, an uniformed patient's spleen was injured during an operation, leading to two further surgeries. Both courts held that physicians had a duty to reasonably disclose the alternatives to a proposed medical treatment and the risks inherent in each. (*Canterbury, supra*, 464 F.2d at 782; *Cobbs, supra*, 8 Cal.3d at 243.)

In *Cobbs*, Justice Mosk, speaking for the court, set down the guidelines for the scope of informed consent by stating:

> "[W]e hold, as an integral part of the physician's overall obligation to the patient there is a duty of reasonable disclosure of the available choices *with respect to proposed therapy* and of the dangers inherently and potentially involved in each." (8 Cal.3d at 243 (emphasis added).)

The *Cobbs* court defined "reasonable disclosure" as sufficient information to permit an evaluation and a decision by the patient weighing the risks, benefits and alternatives against the patient's own individual subjective fears and hopes. (See also *Canterbury, supra*, 464 F.2d at 786.) As stated by the *Cobbs* court:

> "[T]he patient's interest in information does not extend to a lengthy polysyllabic discourse on all

> possible complications. A mini-course in medical science is not required. The patient is concerned with the risks of death or bodily harm, and problems of recuperation." (8 Cal.3d at 244.)

It is *here*, while a patient sorts out such fears and weighs such risks, that plaintiff would have us pause and discuss the University's intellectual curiosity and research interest in diseased tissue, as well as any speculative commercial value of yet unknown research results. And then, to negotiate a reasonable "compensation" arrangement, as we prepare for the therapeutic surgery. The required disclosure under the doctrine of informed consent has *never* included non-medical information such as possible research that is independent of the medical treatment, i.e., to be performed upon diseased tissue after therapeutic removal from the body.[7] And it would become an impossible task if such consent were read to include speculative commercial utility of unknown research results.

Furthermore, as stated by the *Cobbs* court:

> "There must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. Such causal connection arises *only if* it is established that had revelation been made consent to treatment would not have been given." (8 Cal.3d at p. 245.)

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[7] California Administrative Code, Title 22, section 707 sets forth the patient's bill of rights and confirms the doctrine of informed consent. It simply requires the physician to give information to include a description of the procedure or treatment, the significant risks and alternative courses of action.

As noted above (section II), plaintiff does *not* clearly allege that his conduct would have been any different, regardless of what he might have been told. He alleges that a disclosure of the intention to conduct research activities *coupled with* a disclosure of the then unknown commercial utility of unknown research results, would have caused him to have "considered" alternatives. His consent to the splenectomy would not have been *solely* for the purpose of medical care. But he still does not deny he would have consented. And, he alleges no change of conduct for the subsequent tissue withdrawals, regardless of what knowledge he had, except for the two written consents for research removals.

The doctrine of informed consent has been extended in application to human subject scientific experimentation and plaintiff may be attempting to state a claim under that statutory authority. In 1978 California enacted the "Protection of Human Subjects in Medical Experimentation Act." (Health & Saf. Code, § 24170 et seq.) While it was enacted two years *after* plaintiff's 1976 splenectomy, it would otherwise *not* apply to plaintiff's operation, since its definition of medical experiment (Health & Saf. Code, § 24174) is limited to matters that occur "in or upon a human subject," *exclusive* of medical treatment. Further, the elements of its required disclosures (Health & Saf. Code, § 24173) regard *risk* to physical well-being and *not* the potential scientific or commercial uses of the research results. The United States Department of Health and Human Services, under its statutory authority (42 U.S.C. § 289 1-3), also established regulations for the protection of human subjects in experimentation. (45 C.F.R. § 46.101 et seq.) Those federal regulations, however, *expressly*

exclude from their requirements, research conducted upon pathologic or diagnostic specimens. (45 C.F.R. § 46.101 (b) (5).)

Plaintiff's Third Amended Complaint simply does *not* allege the lack of informed consent to the risks of the medical splenectomy, or any professional negligence in his treatment. As to the subsequent withdrawals of blood and substances, plaintiff again fails to allege their impropriety as diagnostic treatment, nor does he allege exposure to any physical risks he was not aware of and consented to. Further, he admits consent to the human subject experimentation aspects of his April 11 and September 30, 1983 visits and does not allege any failure to follow statutory mandates. Finally, nowhere does he deny the defendants' stated purpose, to serve plaintiff's medical needs during each of those visits.

Whether viewed from the medical patient or human subject experimentation perspectives, plaintiff has simply not stated a claim under the doctrine of informed consent. Defendants submit that where, as here, access to the tissue was lawful, there is no claim regarding the dominion exercised for the research conducted. There simply is *no* reasonable property expectancy in research results on the part of a patient or research subject that mandates the protection plaintiff suggests. And, there would be no purpose served by a requirement to discuss speculative utility of yet unknown research results under a duty to obtain "informed consent" (medical or research) to the act of removal.

B. Plaintiff Fails to Allege Any Appropriate Damages for the Lack of Informed Consent

Plaintiff does not allege any *personal injury* damage associated with any alleged lack of informed consent. (*Cobbs, supra,* 8 Cal.3d at 240-241; Code Civ. Proc., § 340.5.) Nor does plaintiff allege any statutory damage under California's "Protection of Human Subjects in Medical Experimentation Act" (Health & Saf. Code, § 24176), which permits an award of $1,000 per occasion where informed consent is negligently omitted, $5,000 where it is willfully omitted, and $10,000 where it is willfully omitted and a substantial risk of injury exists, in addition to any personal injury damages that may have occurred. Instead, plaintiff's alleged damage is directed at the University's research results, the University's patent, its economic value and the intangible knowledge gained in the research. The doctrine of informed consent, as a subject of public policy, applies to personal injury risks, and its breach would not include plaintiff's claims for proprietary economic loss measured by the University's patent or other research results.

C. In Any Event, Plaintiff's Claim for Lack of Informed Consent is Barred by the Statute of Limitations

A cause of action for "lack of informed consent" can be stated either as a tort of battery, or as professional negligence. (*Cobbs, supra,* 8 Cal.3d at 240-241.) The distinction may affect the choice of the statute of limitations. (*Ibid.* at 240.) The California statute of limitations for

negligence is three years. (Code Civ. Proc., § 340.5.) However, since plaintiff's amended complaint appears to have been pled in battery and not negligence, the one year statute of limitations might be applicable. (Code Civ. Proc., § 340(3).) As noted above (discussion of the Conversion cause of action, with reference to the alleged circumstances of the University's patent, derived from an invention disclosure of August 1979, and applied for on January 30, 1981, and the circumstances of the 1976 splenectomy), plaintiff's claim is on its face barred by the statute of limitations. Plaintiff's effort to avoid the statute of limitations by alleging misrepresentation or concealment fails to sufficiently plead a fraud cause of action, and on its face displays the absence of diligence.

V. DEMURRER TO THE "BREACH OF FIDUCIARY DUTY" THIRD CAUSE OF ACTION

A. No Fiduciary Duty Owed Plaintiff Has Been Breached

To state a claim for breach of fiduciary duty, plaintiff "must state facts sufficient to establish that defendants bore a fiduciary duty to plaintiff and that defendants violated that duty." (*Skopp v. Weaver* (1976) 16 Cal.3d 432, 436.) Recognizing the difficulty in defining the elements of a fiduciary relationship, the California Supreme Court recently stated that:

> " . . . before a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship that imposes that undertaking as a matter of law." (*Committee on Children's Television v. General Food Corp.* (1938) 35 Cal.3d 197, 221.)

Plaintiff's Third Amended Complaint fails to allege facts that would establish a fiduciary duty owed plaintiff in the University's research effort to advance medical knowledge. The University acknowledges the special relationship between physician and patient within the scope of medical treatment, but there is *no statutory or case authority to extend the duty owed a patient into the University's independent scientific investigation,* even if the patient's circumstance stimulated the intellectual curiosity that led to the research. Simply put, medical treatment is directed to and the benefits the patient, while research is directed to and benefits the general public; the University's duty regarding each is separate and distinct.

The professors of medicine at a University medical research center are physician/scientists. They not only owe a duty to the patients they serve, but also to the public at large for the advancement of medical science. When acting for the benefit of the patient – within a physician/patient relationship – they owe a special duty to the patient and anything done in that relationship must include the purpose of the patient's medical care and treatment. But, that is not to say it may not also include a benefit to the public as well, for it would be impossible and undesirable to completely separate the two. *Knowledge and experience gained in patient treatment as a physician naturally stimulates the intellectual curiosity of the research scientist.*

Moreover, plaintiff seeks to establish an impossible duty upon defendants. Plaintiff does *not* allege defendants knew of any value to his diseased spleen prior to its removal and examination. Yet plaintiff would require "informed consent" as to such value and any commercial

utility of such research results *before* its use! The only possible purpose served by such a requirement is plaintiff's continued demand for some control or interest in the University's research direction and results. Such a requirement would elevate the physician relationship beyond reasonable limitation, to the detriment of the scientist's investigation into medical knowledge. The separation between physicians and scientists would be lost, and scientific inquiry would suffer.

Patients come to the University's medical research center reasonably expecting to receive medical treatment incorporating all current scientific research knowledge. Moore traveled from his Alaskan home to the UCLA Medical Center no doubt seeking and expecting that benefit. That expectation quite naturally leads to the *reasonable anticipation* that such ongoing research would continue. Yet, while Moore sought the availability of what preceded him, he would by his claim of "fiduciary duty" seek to control the pursuit of curiosity that might follow his medical treatment. If he could hold those who follow accountable to him, would he not be accountable to those who preceded?

The only analogous case the University has found is *Browning v. Norton-Children's Hospital* (Ky. 1974) 504 S.W.2d 713. There, a hospital patient whose leg was amputated in an operation successfully saving his life, sued the surgeon and hospital for alleged "mental anguish" he suffered upon learning his amputated limb had been cremated. In *Browning*, the court concluded:

> "It seems to the Court that when one consents to and authorizes an operation while a patient in the hospital (absent any specific reservation,

> demand, or objection to some normal procedure), he then and thereby, in effect, accepts all the rules, regulations, and modus operandi of that hospital." (*Ibid.*)

Plaintiff's complaint alleges no pre-operation request, restriction, expressed interest or concern about the disposition of his therapeutically removed tissue. Such silence constitutes implied consent to the University's procedures and an abandonment of any interest the patient may otherwise have. Indeed, even where plaintiff admits his awareness of the research, he alleges no challenge to its conduct *or* question on the disposition of its results.

The University's duty to its patients must be viewed in the context of its duty to the public at large to advance medical knowledge through research. Currently, there are four means by which the University lawfully accesses human tissue for study and testing. Two are *post-mortem* means: the California Anatomical Gift Act (California Health and Safety Code §§ 150, et seq.), and the California Unclaimed Dead Bodies Statute (California Health and Safety Code § 206). And, two are *inter vivos* means, requiring informed consent to any physical risks involved in the access: informed consent to medical treatment (*Cobbs v. Grant* (1972) 8 Cal.3d 229), and informed consent to access for research (California Protection of Human Subject and Medical Experimentation Act, Health and Safety Code §§ 24170, et seq. and appropriate federal regulations). As noted above (section IV) the federal and state human experimentation statutes and regulations *expressly* exclude medical treatment and therapeutic/diagnostic specimens from their purview. Where, as here,

the "scientific use" is expressly contemplated by the statute controlling tissue disposition, there is *no* breach of fiduciary duty by the conduct of scientific testing and research involving specimens of therapeutically excised tissue.

If, in the pursuit of its research duty, fortuitous patentable advancements are brought forth, the University is not "unjustly enriched" nor has it taken any unfair advantage from those who receive its medical treatment. As discussed above, patents are limited to intellectual intangible advancements, and are distinct from both the tangible material used in the research, *and* the tangible product of the research. At this point, it is appropriate to note that the tangible research product itself, is, presumptively, made freely available to the public as part of the patent law requirement for an "enabling disclosure" of the invention. (35 U.S.C. § 112; *In Re Argoudelis* (C.C.P.A. 1970) 434 F.2d 1390; *Feldman v. Aunstrup* (C.C.P.A. 1975) 517 F.2d 1351.) Thus, the University retains ownership *only* over the intangible patent, which represents *only* the intellectual contribution of its research scientist, and that retention is pursuant to federal research policy. (35 U.S.C. § 200.) If instead that benefit were awarded plaintiff, in the face of his lengthy silence, the University's research effort, and federal research funding, such would indeed be a windfall and an unjust enrichment.

Finally, scientific research material can now move freely within the circles of those investigating medical questions. Such studies go on for years, quite probably long past the professor's physician-patient relationship, before any real advancement of knowledge occurs. How could an academic medical center fulfill the obligation

plaintiff suggests? When would the duty of disclosure arise? When curiosity is stimulated? When a speculative idea or conception is formed? Or only after it is proven valid through study and investigation? What if one research effort *merges* into another, or *curiosity changes* the course of research, is there a duty to that which is left behind and not pursued? What if several tissues are studied, combined, or dissected and re-combined in a new order, and the research produced a useful result? How much would be attributable to the investigator's intellect, and how much to the things studied?

The University submits that where, as here, a patient seeks medical treatment at an academic medical research center, there is *no* fiduciary duty owed the patient that conditions the University's independent scientific investigation conducted upon therapeutically removed tissue, or its disposition of the results of research. And, the absence of any expressed request to exclude that tissue from such reasonably anticipatable research, implies consent to the research procedures.

B. Plaintiff Fails to Allege Any Appropriate Damage for Any Breach of Fiduciary Duty

Even assuming a breach of fiduciary duty, plaintiff's claim to the products of the University's research goes beyond his damage. *The years of University research effort was the source of any value that may exist;* plaintiff was at most a stimulus to the intellectual curiosity leading to that research. *His excised spleen tissue had no value,* was committed to the University's disposition, and was abandoned. Plaintiff simply has not been damaged.

C. In Any Event, Plaintiff's Claim for Breach of Fiduciary Duty is Probably Barred by the Statute of Limitations

The statute of limitations for a breach of fiduciary duty depends upon the underlying nature of the right sued on. (*Schneider v. Union Oil Company* (1970) 6 Cal.App.3d 987, 993.) Thus, if plaintiff is basing his claim of breach on the ground of fraud and/or conversion, the period would be three years. That limitation, as discussed above and below, precludes any claim to the University's research results.

VI. DEMURRER TO THE "FRAUD AND DECEIT" FOURTH CAUSE OF ACTION

A. Application of Governmental Immunity

As asserted below (section VIII), pursuant to the California Government Tort Claims Act (Gov. Code, § 814 et seq.), *Regents are absolutely immune* from any claim of injury resulting from any fraud or deceit (Gov. Code, § 818.8). Additionally, Golde and Quan are similarly immune unless their conduct constitutes actual malice or corruption, neither of which are sufficiently alleged in the Third Amended Complaint (Gov. Code, § 822.2).

Nonetheless, defendants proceed with an analysis to demonstrate that should plaintiff claim the ability to assert actual malice or corruption on the part of Golde or Quan, his current judicial admissions conclusively demonstrate that a cause of action for fraud or deceit could not be stated. Thus, the demurrer on the part of all the defendants should be sustained, without leave to amend.

B. The Essential Averments of Fraud and Deceit

The essential averments of fraud and deceit by misrepresentation are: (1) a false representation or concealment; (2) of a material fact *susceptible of knowledge*; (3) made with knowledge of its falsity or in reckless disregard of its truth; (4) with the intent to induce plaintiff's conduct; (5) plaintiff's justifiable reliance; and (6) plaintiff's damage. (*South Tahoe Gas Co. v. Hoffman Land Improvement Co.* (1972) 25 Cal.3d 750, 765; *Lesperance v. North American Aviation, Inc.* (1963) 217 Cal.App.2d 336, 345.) The necessary allegations for deceit by concealment are essentially the same except that concealment relies upon a duty to disclose and a failure of that duty. The Third Amended Complaint attempts to allege both misrepresentation and concealment.

C. No Claim for Fraud or Deceit has Been Alleged

1. Plaintiff's Allegations

Plaintiff alleges that defendants concealed their "commercial" interests in the results of their research. Plaintiff further alleges that defendants concealed and failed to disclose their intent to conduct research prior to the splenectomy treatment. Notably, he admits his awareness of the research interest, but does not disclose when or how he first became aware of it; although he admits the defendants affirmatively expressed their "academic" and "scientific medical research" interest in plaintiff's "Blood and Bodily Substances" "throughout plaintiff's care and treatment" (TAC ¶35).

In addition to the concealment claim, plaintiff alleges defendants' affirmative misrepresentation that his "Blood and Bodily Substances" had "no economic or commercial value" (TAC ¶36).

2. No Cause of Action for Concealment has Been Stated

As noted above ("Informed Consent" and "Fiduciary Duty"), there was *no duty to disclose* defendants' interest in scientific testing and research involving therapeutic tissue, or to disclose what was obviously unknown before the tissue was removed (i.e., any speculative value to yet unknown research results). Absent a duty to disclose, no cause of action for fraud or deceit by concealment can be stated. Plaintiff repeatedly alleges defendants concealed "research and commercial" activities; yet, no such activity is alleged prior to 1980, and there is no allegation that defendants knew of any commercial utility prior to that date. What was not disclosed by defendants? The unknown and unknowable? What duty could there be for such a disclosure?

3. Plaintiff's Allegations Lack Specificity

Allegations of fraud and deceit must also be clear and unequivocal. Conclusions, ambiguities and generalizations are not sufficient and facts must be pled specifically for each element of the cause of action. (*Norkin v. United States Fire Ins. Co.* (1965) 237 Cal.App.2d 435, 437; *Lesperance, supra,* 217 Cal.App.2d at 344.)

Plaintiff's allegations of concealment, while appearing specific, are hopelessly ambiguous in his attempt to join the matter of "research" with the matter of "commercial" interest in the research results. Plaintiff still attempts to tuck and hide his knowledge of the research conduct, behind a claim he was unaware of any speculative commercial utility in the unknown research results. Plaintiff does *not* allege defendants knew of any value to the unknown research results, prior to the splenectomy. Indeed, while plaintiff alleges "research and commercial" interest throughout the Third Amended Complaint, he alleges *no* specific commercial utility activity until 1980, over three years from the date of his 1976 splenectomy, during which time he admits research was being conducted.

Further, while both a general and special demurrer raise the issue of specificity, the examination under a challenge of special demurrer require facts which show: how, when, where, to whom, and by what means defendants' representations were made; from what data the falsity of defendants' intentions could be inferred; and how, when, where, through whom, and in what circumstances plaintiff become justified in relying on defendants' alleged representation. (*Hill's Transp. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 707.) Just what is it that defendnts [sic] failed to tell plaintiff, and when did defendants first know it? Plaintiff's allegations of affirmative misrepresentation of economic value are hopelessly uncertain and lack the specificity necessary to demonstrate defendants' wrongful conduct or plaintiff's justifiable reliance on such to his damage.

4. Plaintiff Failed to Allege Materiality of any Misrepresentation

To constitute actionable fraud, the misrepresentation must be of a material fact, i.e., a fact without which the transaction would *not* have occurred. (*Friedberg v. Weissbuch* (1955) 135 Cal.App.2d 750, 754; *Thomas v. Hawkins* (1950) 96 Cal.App.2d 377, 379.) Plaintiff's Third Amended Complaint seems to suggest that plaintiff permitted the withdrawal of his blood and substances upon the representation that such related to his health care, treatment and well-being. *Nowhere* does plaintiff allege *any* conduct taken in *reliance* upon the alleged misrepresentation of the material's value.

5. Plaintiff's Misrepresentation Allegations do not Demonstrate Falsity, or Defendants' Knowledge of Falsity

Generally the misrepresentation must be one of *fact*. A *prediction* of future events is usually regarded as a nonactionable expression of opinion. (*Wolleson v. Coburn* (1923) 63 Cal.App. 315, 323; *Holton v. Noble* (1890) 83 Cal. 7, 8.) The representations must also be false, and known to be false (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 811), or made in reckless disregard of truth or falsity (*Gagne v. Bertran* (1954) 43 Cal.2d 481, 487). Falsity and knowledge is determined as of the time when the representation was relied upon, and not as perceived in light of subsequent events. (*Le Clercq v. Michael* (1948) 88 Cal.App.2d 700, 703; *California Credit & Collection Corp. v. Bernardini* (1926) 77 Cal.App. 381, 384-4.) There can be no retroactive reliance on statements that come to plaintiff's

attention *after* the transaction occurred. (*Shell v. Schmidt* (1954) 126 Cal.App.2d 279, 288; *cert. den.* 348 U.S. 916.)

How would the University have known of any value or that its research might result in a patentable invention? Patentable subject matter is presumptively unknown, nonexistent and nonobvious, prior to its invention. (35 U.S.C. §§ 102 and 103.) Plaintiff suggests, from a position of hindsight, that the University owed plaintiff a duty to disclose what was unknown, nonexistent, and nonobvious. A rather onerous duty indeed, and one which would create a considerable chilling effect upon the research ingenuity, precisely because the effort might succeed and produce something new, something different, as it did in this case.

Even assuming the University represented that plaintiff's bodily substances were of "no commercial or financial value," could that be anything but a reasonably accurate opinion? Indeed, such material was and still is valueless. *It is the University's research effort that produced any matter value.* It is the knowledge that came from that research that is the subject of the patent and represents the matter of value.

Finally, plaintiff alleges the University failed to disclose its intention to patent the invention arising from its research. However, not only are patentable advancements unknown before their invention, prior to the 1980 landmark United States Supreme Court decision in *Diamond v. Chakrabarty* (1980) 447 U.S. 303 [65 L.Ed. 2d 144] there was only uncertainty over whether any such biological subject matter was patentable. And, if a patent or commercial activities were intended, why would or did the

University wait, as plaintiff's pleading alleges, until January 1981 to apply for the patent? Indeed, why would the inventors have waited until August 1979 to file the invention's disclosure with the University (nearly three years *after* plaintiff's splenectomy)? Such a delay could only jeopardize the application and risk loss of patentability under the patent requirements of novelty and nonobviousness. (35 U.S.C. §§ 102 and 103.)

Thus, by the very existence of the University's patent, and the presumptions that arise from it, plaintiff's pleading demonstrates that no actionable misrepresentation or concealment as to the value of his bodily substances could have occurred. There was no fraud or deceit, simply because the alleged subject matter was presumptively unknown and nonexistent at the time.

6. Plaintiff has Not Been Damaged by Any Alleged Fraud or Deceit

Plaintiff *no longer* suggests he would *not* have proceeded with the 1976 splenectomy had he known what was allegedly concealed. He only alleges he would have "considered" his alternatives (TAC ¶25), if he knew what the results of the research would have been (TAC ¶26). And, as noted above, he does *not* allege any change in conduct on the subsequent withdrawals. If he proceeded with the splenectomy, once removed, California Health and Safety Code section 7054.4 committed the subsequent disposition of the diseased spleen to the University's discretion.

Nonetheless, assuming he would have refused to proceed with the splenectomy treatment, actual pecuniary damage is necessary for a recovery based on fraud and deceit. (*South Tahoe Gas Co., supra,* 25 Cal.App.3d at 765.) And, there can be no such damage in the absence of a vested right:

> "One cannot be defrauded of that in which he has no vested right. A vested right is property which the law protects, while a mere expectancy is not property, and therefore is not protected." (*Haldane v. Freedman* (1962) 204 Cal.App.2d 475, 479.)

Plaintiff had no right, much less a vested right, in the results of the University's research.

D. In Any Event, Plaintiff's Claims for Fraud and Deceit Are Barred by the Statute of Limitations

The statute of limitations for fraud and deceit is three years. (Code Civ. Proc., § 338(4).) If, on the face of the complaint, the statute of limitations has passed, in order to avoid a demur plaintiff must plead with particularity: his lack of prior knowledge of the facts; the time and circumstances of his discovery; and, facts displaying his reasonable diligence. (*Casualty Insurance Co. v. Rees Investment Co.* (1971) 14 Cal.App.3d 716, 719-20; *Orange County Rock Prod. Co. v. Cook Bros. Equip. Co.* (1966) 246 Cal.App.2d 698, 703.) As discussed in the analysis of the First Cause of Action for conversion, plaintiff's amended complaint itself demonstrates the absence of diligence, necessary to avoid the demur based upon the statute of limitations. Plaintiff admits his notice of research and his repeated inquiry into the value of his bodily substances,

throughout his treatment; he had sufficient cause to inquire as to the University's policies on the disposition of research results.

VII. DEMURRERS TO THE REMAINING FIFTH THROUGH THIRTEENTH CAUSES OF ACTION

A. Demurrer to the "Unjust Enrichment" Fifth Cause of Action

Unjust enrichment occurs where one obtains a benefit which he may not justly retain. (*Gonzales v. State of California* (1977) 68 Cal.App.3d 621, 631; *Branche v. Hetzel* (1966) 241 Cal.App.2d 801, 807.) The University was not unjustly enriched. *First*, plaintiff had no property interest to his therapeutically removed tissue. *Second*, he was not entitled to compensation for the use of his tissue specimen in the University's research. *Third*, he has no claim of right, title or interest in the University's patent since his only "contribution" was therapeutically removed tissue committed by statute to the University's disposition, or tissue for which he gave research consent. *Fourth*, his "contribution" was merely fortuitous. *Fifth*, he does not allege any enrichment beyond research knowledge; and, it was the defendants' effort that produced any matter of value there may be in that research. Therefore, any benefits received by the University is justly theirs.

B. Demurrer to the "Quasi-contract" Sixth Cause of Action

A quasi-contract is not a true contract because it lacks assent or agreement by the parties. The law implies or imposes a quasi-contract where one party unjustly

receives a benefit which good conscience would require be reimbursed. (*Harold A. Newman Co. v. Nero* (1973) 31 Cal.App.3d 490, 497.) The doctrine of quasi-contract is founded upon the doctrine of unjust enrichment. (*Gonzales, supra,* 68 Cal.App.3d at 627-28.) Accordingly, since the University was not unjustly enriched, no quasi-contract should be imposed.

C. Demurrer to the "Bad Faith Breach of the Implied Covenant of Good Faith and Fair Dealing" Seventh Cause of Action

> "There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract. . . . " (1 Witkin, Summary of Cal. Law (8th Ed. 1973) Contracts § .476 P.493.)

Plaintiff alleges a contractual relationship for "medical care in the treatment and monitoring of [his] condition" (TAC ¶91). *Nowhere* does plaintiff allege any breach or failure in his receiving that "benefit." Indeed, plaintiff does *not* allege a covenant of benefit that should be implied and was breached by defendants (TAC ¶99). Plaintiff's attempt to allege a tortious breach of the implied covenant of good faith, by pleading a "special relationship" (*Wallis v. Superior Court* (1984) 160 Cal.App.3d 1109, 1116-1119) is insufficient for his failure to allege any breached implied covenant. Plaintiff alleges *no* refusal or denial of any medical benefit or service for his treatment, whether previously known or derived from the University's research. And, plaintiff alleges *no* contractual basis for a claim to the *independent* scientific research of the University.

D. Demurrer to the "Intentional Infliction of Emotional Distress" Eighth Cause of Action

The essential averments for a claim of intentional infliction of emotional distress include "extreme and outrageous conduct" by defendants, with either the intentional causing, or reckless disregard of the probability of causing, emotional distress. (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.) Liability is not imposed unless the conduct is "so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Ibid.*) The court may determine in the first instance that a jury could not reasonably find the defendants' conduct so extreme and outrageous as to permit recovery under such a claim. (*Golden v. Dungan* (1971) 20 Cal.App.3d 295, 308-9.)

In the instant case, plaintiff alleges the University's research on specimens of therapeutically removed tissue. And, the allegations of misrepresentation and concealment only regard the value of these specimens and the intention to exercise dominion over the results of such research, and no other conduct. *Indeed,* plaintiff alleges that he consented to the research (although under an alleged misunderstanding about its economic worth). Clearly, the complaint does not allege "extreme and outrageous conduct" comprising a cause of action for the intentional infliction of emotional distress.

E. Demurrer to the "Negligent Misrepresentation" Ninth Cause of Action

As noted below (section VIII), under the California Government Tort Claim Act, defendants are *all* absolutely

immune from plaintiff's claim of injury arising from any negligent misrepresentation.

F. Demurrer to the "Intentional Interference with Prospective Advantageous Economic Relationship" Tenth Cause of Action

The necessary averments for a claim of interference with prospective economic advantage are: (1) an *existing* economic relationship containing the probability of future economic benefits; (2) *knowledge* by the defendant third party of the existing relationship; (3) the defendant's intentional conduct designed to disrupt the relationship; (4) actual *disruption* of the relationship; and (5) damage to the plaintiff proximately caused by the defendant's conduct. (*Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 827.) Quite simply put, this tort requires the existence of an economic relationship which is known to, and disrupted by, the defendants. Plaintiff fails to allege any of those requirements.

G. Demurrer to the "Slander of Title" Eleventh Cause of Action

The necessary elements for a slander of title claim include an unprivileged publication of an untrue disparagement to another's property that foreseeably would and does impair the vendibility of the property. (*Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 262-3.) Since plaintiff has no reasonable property expectation in tissue

removed with consent, or in the results of the University's research, this cause of action would fail. Furthermore, plaintiff fails to allege any *disparagement* to his "property" or the loss of its *vendibility*.

H. Demurrer to the "Accounting" Twelfth Cause of Action

A claim for an accounting is a remedial action, totally dependent upon the existence of a relationship and duty between the parties. Thus, plaintiff's claim rests upon the prior determination of his "property interest" or his claimed "fiduciary duty" regarding the University's research results. Furthermore, a claim for accounting must also allege plaintiff's prior demand for an accounting and its refusal by the University. (*Wooster v. Nevills* (1887) 73 Cal. 58, 60.)

I. Demurrer to the "Declaratory Relief" Thirteenth Cause of Action

The necessary averments for declaratory relief must demonstrate that the subject matter is appropriate and that an "actual present controversy" exists over the subject. (*Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 947; Code Civ. Proc., § 1060.) Plaintiff's complaint simply does *not* identify the subject of his alleged "dispute" with the University. Is it the substances removed from his body during consented medical treatment? Is it the Mo cell line that resulted from the University's research, and which (by presumption of the federal patent laws) is made available to the public domain? Or, is it the patent issued to the University as a result of its research effort?

This "essential part" of the claim for declaratory relief, describing the dispute, must be "pleaded specifically." (*Ibid.*)

VIII. DEMURRER TO ALL CAUSES OF ACTION BY CLAIM OF IMMUNITY

A. Immunity Under the California Government Tort Claims Act

The California Government Tort Claims Act (Government Code §§ 814, et seq.) establishes absolute public entity immunity for claims of tort, except as provided in the statute (Government Code, §815). *And*, while a public entity may be liable for the conduct of its employees within the scope of their employment, it is *absolutely immune* for claims of misrepresentation; it is:

> "*not* liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be *negligent* or *intentional*."
>
> (Government Code § 818.8, emphasis added.)

In addition, public entities are absolutely immune from exemplary or punitive damages (Government Code, § 818).

A public employee is:

> "*not* liable for an injury caused by his misrepresentation, whether or not such misrepresentation be *negligent* or *intentional, unless* he is guilty of actual fraud, corruption, or actual malice."
>
> (Government Code, § 822.2, emphasis added.)

In defining the scope of the "actual fraud," exception to the public employee immunity, the court in *Schonfeld v. City of Vallejo* (1975) 50 Cal.App.3d 401, 410 stated:

> "Accordingly, we hold that the immunity afforded by Government Code section 822.2 applies unless, in addition to the essentials of common law deceit, a public employee is motivated by corruption or actual malice, i.e., a conscious intent to deceive, vex, annoy or harm the injured party in his business."

In its footnote 9 to that quote, the court noted:

> "Penal Code section 7 defines malice as importing 'a wish to vex, annoy, or injure another person, or an intent to do a wrongful act.' 'Actual malice' is defined by Civil Code section 48a, subdivision 4(d) in the context of defamation, as a 'state of mind arising from hatred or ill will toward the plaintiff.' "
>
> (*Ibid.*)

Thus, the reference to "actual fraud" in that statutory context is the equivalent of "corruption or actual malice." Otherwise, as the *Schonfeld* court noted, the statute would be rendered meaningless.

That immunity from negligent and intentional misrepresentations for public entities and public employees, includes all four forms of fraud and deceit: intentional misrepresentation, negligent misrepresentation, concealment and a promise made without the intention of performance. (Case citation *Page v. City of Montebello* (1980) 112 Cal.App.3d 658, 670-71.)

B. Application of Immunity to the Plaintiff's Claims

In *Johnson v. California* (1968) 69 Cal.2d 782, 799-800, the court noted the particular "commercial interest" aspect of the misrepresentation immunity:

> "In short, 'misrepresentation,' as a tort distinct from the general milieu of negligent and intentional wrongs, applies to *interferences with financial or commercial interests*. The Legislature designed section 818.8 to exempt the governmental entity from this type of liability."
>
> (Emphasis added.)

In *Johnson*, the California Supreme Court relied upon *United States v. Neustadt* (1961) 366 U.S. 696, 711, n.26, where the Court (quoting Dean Prosser) similarly noted that "misrepresentation" as a separate tort:

> " 'has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character, in the course of business dealings.' "

The Regents is expressly a "public entity" under the California Government Tort Claims Act (Gov. Code, § 811.2). Its employees are public employees. Pursuant to that Act, The Regents is *absolutely immune* from any claim of injury arising from any negligent or intentional misrepresentation and any claim for punitive damages. Moreover, since plaintiff does *not* allege medical malpractice, *admits consent* to the medical treatment and seeks to avoid that consent *solely* by reference to the alleged negligent or intentional misrepresentations, the immunity would likewise apply to *all* the causes of action stated by

plaintiff. Thus, The Regents is absolutely immune from all claims asserted by plaintiff because each is dependent upon the alleged negligent or intentional misrepresentation.

Likewise, Golde and Quan are immune from the misrepresentation claims, as well as the other claims relying upon a claim of misrepresentation. Plaintiff has not alleged any conduct inconsistent with appropriate and proper medical treatment. He simply does *not* allege facts that would constitute conduct on which Golde *or* Quan could be said to be "guilty" of the ill-will or purpose to harm that would comprise corruption or actual malice in their conduct towards him.

Since each cause of action is dependent upon a finding of intentional or negligent misrepresentation (substantively and to avoid the application of the statute of limitations); and since there is *no* alleged personal injury as a result of any claimed medical malpractice or professional negligence; and since plaintiff's entire claim is for alleged commercial and financial interest damage; the defendants' demurrer based upon immunity for each and all the defendants should be sustained.

IX. REQUEST THAT DEMURRERS BE SUSTAINED WITHOUT LEAVE TO AMEND

The Third Amended Complaint is plaintiff's fourth effort to state a claim against defendants, over a 13-month period. The original Complaint, containing three causes of action, was filed September 12, 1984. Prior to a hearing on the University's demurrer to that complaint, plaintiff filed his First Amended Complaint, containing

twelve causes of action, in early December 1984. At that time, plaintiff initiated formal discovery, in addition to his prior informal access to his medical records. Following the University's demurrer, plaintiff filed his Second Amended Complaint, again containing twelve causes of action, in early April 1985. Following a demurrer to that third version, this Third Amended Complaint, now containing thirteen causes of action, was served on October 24, 1985.

Formal discovery conducted by plaintiff since December 1984 includes: a five and one-half day deposition of defendant Golde (four and one-half days with The Honorable Joseph Wapner as referee); a four day deposition of defendant Quan; a full day deposition of The Regents' custodian of Records; over one hundred pages of responses to plaintiff's interrogatories; and, the production of approximately 40,000 pages of documents responsive to plaintiff's six three-category document production request. (See the Declaration of Allen B. Wagner filed herewith.)

With that amount of discovery, stretching over nearly a year, and with four opportunities, if plaintiff has not yet stated a legally cognizable claim, defendants' demurrers should be sustained *without leave to further amend*. If he has not yet stated his best case, why not? If he has and it fails, what purpose is served by further delay? There is little, if anything, to be gained by having this case languish through the busy pre-trial and trial calendars of this Court.

While the University does *not* agree with plaintiff's allegations regarding the defendants' intentions, we do

believe the issue of law raised by these demurrers, and appearing on the face of the complaint, renders any further question irrelevant. Plaintiff simply fails to allege the breach of any *duty* owed plaintiff or the interference of any *property* right he may have.

X. CONCLUSION

John Moore came to the University of California, Los Angles Medical Research Center, and specifically to Professor Golde, seeking their assistance because of their knowledge and fame for scientific research. He sought to benefit from all the University's research that preceeded his visit. Now, by this action, Moore seeks to hold the source of that knowledge captive and those that might follow accountable to him. He claims a right, title and interest to the results of the University's research that followed his visit.

Moore does *not* deny receiving the best medical attention available for his hairy-cell leukemia. He asserts *no* medical malpractice or professional negligence. He does *not* object to the fact that research was conducted; indeed, he admits he always knew is was going on, and admits his express as well as tacit consent to it.

Moore's complaint is based upon two claims, one of which is a waived property claim, while the other is an admitted impossible duty:

First, Moore asserts a property interest by claiming he never consented to research conducted upon his therapeutically removed spleen; however, his subsequent behavior demonstrates his waiver of that claim and an

approval of the research, both expressly *and* tacitly (for he admits knowledge of the research throughout his treatment).

Second, Moore asserts a breach of duty by claiming he was never told of the speculative value, including possible commercial utility, of unknown research results; however, after extensive discovery, he alleges *no* such commercial utility, or defendants' knowledge of commercial potential, prior to 1980, over three years after his splenectomy, during which time research was conducted with his knowledge and without objection. Moore's complaint then is merely that the University did not discuss speculative value or utility of unknown research results. Could there be such a duty?

Moore's diseased tissue was a single event in an endless chain of circumstances that stimulate and affect the course and direction of the University's research for medical knowledge. Others came before him and others have already followed the presentation of his disease. Such research would not be necessary or pursued if, as plaintiff seems to suggest, the results were known beforehand. And, there would be no purpose or policy supporting the award of a patent to the source of such research curiosity.

Moore does *not* seek anything that was or is his by any right or claim. He seeks the product of the University's intellect without any contribution beyond the presentation of his fortuitous disease. If he has such a claim, where and how would such claims end? If the presentation of a deformed knee stimulates the intellectual curiosity of an orthopedic surgeon into designing a new and

patentable artificial knee joint, would the patient have any claim of right, title or interest in the patent? What if the new knee joint was the product of years of orthopedic work, would all those precedent patients have such a claim? Obviously not. Any dominion or property right exercisable over such advancements in knowledge goes only to those that conceive and reduce to practice useful solutions to problems – they are not rewards for the problems themselves.

Thus, Moore's complaint seeks what is not his and, in order to state such a claim, he must allege the impossible – defendants' knowledge of the unknown and unknowable. He does not, and indeed could not, so allege. His pleading then is a non sequitur, for the allegations fail to state a legally congnizable claim against the defendants. The University respectfully submits the question – with a request that their demurrer be sustained, this time, without leave to further amend.

Dated: November 21, 1985.

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Appellate No. B021195

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

JOHN MOORE,

Plaintiff and Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC.; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICALS CORPORATION aka SANDOZ, INC. and DOES 1 through 1000, inclusive,

Defendants and Respondents.

Appellate No. B021195

APPELLANT'S OPENING BRIEF

Consolidated Appeal From Separate Judgments
of the Superior Court of Los Angeles County
The Honorable Warren H. Deering and
John L. Cole, Judges

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62 A Am.Jur.2d *Property* §11 [1984] 21

63 Am. Jur. 2d *Property* §11 [1984] 21

Andrews, *My Body, My Property,* Hastings Center Rep., 16:5 [October 1986], 28, at 37 69

Comment, *Toward The Right Of Commerciality: Recognizing Property Rights In The Commercial Value Of Human Tissue,* 34 UCLA L.Rev. 208 [1987]...22, 68

Delgado and Leskovac, *Informed Consent In Human Experimentation: Bridging The Gap Between Ethical Though And Current Practice,* 34 UCLA L.Rev. 501 [1987] 68, 69

Fleming on Torts (4th Ed. 1971) 38

Golde "Availability of Mo and HTLV-II, 308 *Nature* 19 [1984] 46

Golde, Quan and Cline, "Human T-Lymphocyte Cell Line Producing Colony-Stimulating Activity, 52 *Blood* 1068 [1978] 44

Holder and Levine, "Informed Consent for Research on Specimens Obtained at Autopsy or Surgery: A Case Study in the Overprotection of Human Subjects", 24 *Clinical Res.* 68, 68 [1976] 43, 45

Letter, Dr. D.T. Chalkey, Office for Protection from Research Risks, National Institutes of Health, DHEW, May 22, 1975 43

Prosser on Torts (4th Ed. 1971) 38, 63, 71

Restatement (2d) of Torts, §228, Comment (c) 29

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Saxon, Stevens, and Golde, "T-Lymphocyte Variant of Hairy-Cell Leukemia," 88 *Annals Internal Med.* 323 [1978] 46

Witkin, *California Procedure* [2d Edition 1971], §696, p. 2319 58

I. PREFATORY STATEMENT.

This is a Consolidated Appeal by John Moore from two separate Orders of Dismissal and judgments entered thereon following the sustaining of Demurrers by the Los Angeles County Superior Court in an action instituted by John Moore against Defendants The Regents of the University of California, David W. Golde, M.D., Shirley G. Quan, Genetics Institute, Inc., Sandoz, Ltd., Sandoz United States, Inc., and Sandoz Pharmaceuticals Corporation for damages and declaratory relief.

After the Demurrer of Defendants The Regents, Golde and Quan to Plaintiff's Third Amended Complaint was sustained with leave to amend, Plaintiff advised the court that he would stand on the complaint, and accordingly the Superior Court, the Honorable Warren H. Deering presiding, entered an Order Dismissing Action against Defendants The Regents, Golde and Quan Only and Judgment for those Defendants thereon on March 19,

1986. (CTR 1050-1051).* Plaintiff and Appellant filed a timely Notice of Appeal on May 15, 1986. (CTR 1056-1058).

After sustaining without leave to amend the subsequent and separate Demurrers of Defendants Genetics Institute, Inc. and Sandoz Pharmaceuticals Corporation, the Superior Court, the Honorable Judge John L. Cole presiding, entered and filed an Order of Dismissal of Plaintiff's Action against those Defendants on July 2, 1986. (CTGS 801-804). Plaintiff and Appellant filed a timely Notice of Appeal on August 28, 1986. (CTGS 805-811).

On December 5, 1986, following Plaintiff-Appellant's Motion for Consolidation, the Court of Appeal, the Honorable Presiding Justice Woods, ordered that the appeals of these dismissals filed on May 15, 1986 and August 28, 1986 be consolidated.

Plaintiff effectuated service upon Defendant Sandoz, Ltd., a Swiss corporation, which moved to quash said service. That motion was granted, and Plaintiff has filed a notice of appeal of that ruling.

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*For purposes of this consolidated appeal, the parties have stipulated that references to the Clerk's Transcript prepared in response to the Notice of Appeal filed May 15, 1986 from the dismissal of Plaintiff's Third Amended Complaint against Defendants The Regents, Golde and Quan shall be designated at "CTR". References to the Clerk's Transcript prepared in response to the Notice of Appeal filed August 28, 1986 from the dismissal of the same complaint against Defendants Genetics Institute and Sandoz Pharmaceuticals Corporation shall be designated as "CTGS."

II. STATEMENT OF THE CASE.

A. PROCEDURAL HISTORY.

1. Order of Dismissal and Entry of Judgment Thereon of Plaintiff's Action Against Defendants The Regents, Golde and Quan.

The Demurrer of Defendants the Regents, Golde and Quan to Plaintiff's Third Amended Complaint was sustained by the Los Angeles County Superior Court, Department 83, the Honorable Judge Warren H. Deering presiding, on December 31, 1986. (CTR 982-983). The Court sustained the general Demurrer to the First Cause of Action for conversion, "and to the extent that it is incorporated in all of the remaining causes of action," sustained the Demurrers to the remaining twelve causes of actions set forth in the Complaint.

Among the grounds offered by the Court in its Minute Order were Plaintiff's supposed failure to allege that he did not consent to "medical or scientific study," or that the Defendants knew Plaintiff's blood cells had commercial value and intended to commercially exploit them prior to their withdrawal from Plaintiff. The Court also referred to Plaintiff's supposed failure to allege whether he consented to his splenectomy for therapeutic purposes, or that the splenectomy was totally unrelated to therapeutic purposes. (CTR 982-983).

The Court also mentioned that no copy of Exhibit "A" was attached to the Third Amended Complaint. This point appears to have been made moot by the fact that Exhibit "A" had been misplaced or lost by the clerk and was therefore unavailable for the Court's review, despite

the fact that it had been duly filed with the Court along with the Third Amended Complaint (CTR 758-759).

The Court granted Plaintiff thirty days leave to amend after notice by Defendants. (CTR 983). Plaintiff subsequently filed a Motion for Clarification or, in the alternative, for reconsideration of ruling on Defendants' Demurrer to Plaintiff's Third Amended Complaint (CTR 987-1001). The Court clarified its ruling by indicating that since the Demurrer to the First Cause of Action was sustained on certain grounds, and the First Cause of Action "was incorporated into the remaining causes of action," those remaining twelve causes of action "were defective for the same reasons." (CTR 1034-1035). Plaintiff subsequently filed his notice of election not to amend Plaintiff's Third Amended Complaint (CTR 1043-1052) along with a letter to the Court explaining Plaintiff's decision to seek an appellate determination of the issues raised by the Court's ruling on the Defendants' Demurrer.

On March 19, 1986, Judge Deering issued an Order Dismissing Action Against Defendants the Regents, Golde and Quan only. (CTR 1050-1052). On May 15, 1986, Plaintiff filed and served a timely notice of appeal of the Order of Dismissal and Judgment thereon for Defendants the Regents, Golde and Quan only. (CTR 1056-1058).

2. Order of Dismissal and Entry of Judgment Thereon Of Plaintiff's Action Against Defendants Genetics Institute, Inc. and Sandoz Pharmaceuticals Corporation.

Defendants Genetics Institute, Inc., and Sandoz Pharmaceuticals Corporation each subsequently filed separate

demurrers to the same Third Amended Complaint. The Los Angeles County Superior Court, Department 88, the Honorable Judge John L. Cole presiding, sustained the demurrers without leave to amended.

In its Minute Order (CTGS 801-804), the Court agreed with Judge Deering's ruling regarding Plaintiff's supposed failure to allege no medical purpose for the splenectomy operation. The Court further indicated that because there already was an appeal pending that may resolve "the central issues," the Court did not grant leave to amend. (CTGS 801-802).

The Order of Dismissal of Plaintiff's actions against Defendants Genetics Institute, Inc. and Sandoz Pharmaceuticals Corporation was signed by Judge Cole and entered and filed on July 2, 1986. (CTGS 804). On August 28, 1986, Plaintiff filed and served a timely Notice of Appeal of the Order of Dismissal. (CTGS 805-834).

3. Consolidation of These Appeals.

On November 10, 1986, Plaintiff filed a Motion to Consolidate Plaintiff's Appeals of Separate Orders of Dismissal and Judgments Entered Thereon with this Court of Appeal, arguing that the same questions of law were central to both Appeals, and the court, in issuing the second Order of Dismissal, expressly adopted positions taken by the court in issuing the first Order of Dismissal. On December 5, 1986, the Court of Appeal, Presiding Justice Arleigh Woods, ordered the Appeals filed on May 15, 1986 and August 28, 1986 consolidated.

B. STATEMENT OF FACTS AS ALLEGED IN PLAINTIFF'S THIRD AMENDED COMPLAINT.

1. Plaintiff's Blood Cells Have Unique and Commercially Valuable Properties.

Plaintiff John Moore has unique white blood cells (lymphocytes) which produce unique and plentiful immune system regulators (lymphokines) which are important in the human body's defense mechanisms against blood diseases, cancers, immune system deficiencies (such as AIDS), various cancers, and other diseases. (CTR 707:25-28, 708:1-5). As a result, samples of Plaintiff's blood cells, when cultured and grown in the laboratory, are of great value and importance in the commercial development of therapeutic biological products useful in the treatment of such conditions, as well as in the prevention of anemias and other blood disorders. Specifically, Plaintiff's unique cells produce lymphokines and blood factors which play important roles in the development and proliferation of specialized blood cells, and do so in scientifically, therapeutically, and commercially useful fashion and quantities so as to facilitate large scale production of those lymphokines for medical and commercial use. (CTR 708:6-13; 722:27-28, 723:1-22; 737:4-27, 738:1-8).

In describing Plaintiff's cells, Plaintiff's former physician, Defendant Golde, has stated in writing that "to our knowledge, this is the only human cell-line that produces these factors and, because it is an immortalized cell line, the factors can be produced in large quantities." (CTR 724:2-15). However, Plaintiff was not informed and

was kept unaware of the unique properties and commercial value of his blood cells by Defendant Golde and the other Defendants at least until within one year of the filing of this lawsuit. (CTR 736:20-28, 737:1-3).

2. Plaintiff Entered Into a Physician-Patient Relationship With Defendants The Regents, Golde, and Quan Which Continued For a Seven Year Period From 1976 to 1983.

In 1976, Plaintiff was diagnosed as having a rare blood disorder known as "hairy-cell leukemia." (CTR 710:24-26). Plaintiff sought an additional opinion and consulted Defendant David W. Golde, M.D. at UCLA Medical Center in October, 1976. (CTR 710:27-28, 711:1-3). Defendant The Regents owned and operated UCLA Medical Center, holding themselves out to provide care and treatment for patients (CTR 708:20-24), and Defendant Golde is a medical doctor, licensed to practice in the State of California (CTR 708:26-27) who possesses expertise in blood and blood components (CTR 711:4-14).

These Defendants examined Plaintiff and confirmed the diagnosis of Plaintiff's condition, claiming that it required further medical care which they would provide. (CTR 711:20-28). Defendants Golde and The Regents also indicated to Plaintiff that, as part of their care, they would surgically remove his spleen. (CTR 712:1-5). On October 20, 1976, certain UCLA surgeons (not Defendant Golde) performed this splenectomy, to which Plaintiff consented based solely upon the Defendants' representations that the procedure was necessary for his care and treatment. (CTR 714:19-28, 715:1).

Thus began a physician-patient relationship between Plaintiff and Defendants The Regents, Golde and Quan which continued uninterrupted over a seven year period from 1976 through September 20, 1983, or later. (CTR 717:16-28, 7:18:1). At the direction of the Defendants, and in reliance on their representations to him that such visits and tests were necessary for his health and well-being, Plaintiff returned periodically to the facilities of Defendants Golde and The Regents on approximately one dozen occasions at roughly six-month intervals throughout the seven year physician-patient relationship. Each of these visits was for the purpose of enabling the Defendants to withdraw from Plaintiff large quantities of his blood and tissues. (CTR 718:2-9).

3. The Defendants Acquired and Maintained Access To Specimens of Plaintiff's Unique Blood Cells Throughout the Seven Year Period by Virtue of Their Physician-Patient Relationship With Plaintiff.

The Defendants represented to Plaintiff that the periodic withdrawals of his blood and tissue were necessary for his health, and that they were to be performed only by the Defendants and at their direction exclusively at their facilities at UCLA Medical Center. (CTR 718:6-18). These removals began two weeks prior to the splenectomy (CTR 711:20-23), and included the subsequent operation and the approximately one dozen periodic visits which followed throughout the seven year period of the physician-patient relationship. (CTR 717:16-28).

4. The Defendants Discovered the Unique and Commercially Valuable Characteristics of Plaintiff's Blood Cells and Grew Them In the Laboratory For Their Own Use.

Because of their expertise and familiarity with blood and blood components, the Defendants were aware, prior to their contact with Plaintiff, that blood products and components with certain qualities would be of great value in commercial and scientific efforts to develop profitable therapeutic products. (CTR 711:4-9). In addition, the Defendants also knew that access to a patient with blood cells possessing unique properties would provide them with a steady and natural source of valuable blood and blood components, and would provide them with competitive, commercial and scientific advantages. (CTR 711:10-19).

Prior to Plaintiff's splenectomy, Defendants Golde, Quan and others, without advising Plaintiff or obtaining his consent, made arrangements to obtain portions of his spleen tissue following its surgical removal in connection with their desire to have access to Plaintiff's blood cells. (CTR 712:6-13). In fact, prior to the operation, Defendant Golde provided written instructions to the medical and research staff of Defendant The Regents, instructing them to study and characterize Plaintiff's blood cells for research purposes independent of Plaintiff's care (CTR 713:9-28, 714:1). This was done without informing the Plaintiff or obtaining his consent.

Following the operation, Defendants Golde and Quan removed from the pathology department portions of Plaintiff's spleen, and took them to a separate research facility of Defendant The Regents, where Plaintiff's blood

cells were studied and grown. The cells were studied and stored by the Defendants in order to further research and commercial activities of the Defendants which were unrelated to Plaintiff's health care. (CTR 715:2-16).

As their physician-patient relationship with Plaintiff continued, and as they observed the characteristics of the cell-lines grown from Plaintiff's cells, the Defendants recognized the cells' unique ability to produce important lymphokines in a commercially useful fashion. (CTR 722:27-28, 723:1-7). Therefore, the defendants recognized that the unique properties of Plaintiff's cells would not only enable them to obtain useful quantities of those lymphokines, but also to facilitate the identification and cloning of the genetic sequence possessed by Plaintiff's cells which was responsible for their lymphokine production. (CTR 723:7-13).

In August, 1979, Defendant Golde submitted to officials of Defendant The Regents a "Report of Possibly Patentable Device, Process, Product or Plant" describing Plaintiff's cells, in which he states that the "cell line is unique because it produces a series of T-cell products referred to lymphokines", and that "many of these factors may have considerable value as reagents and ultimately as therapeutic products." The report goes on to state that "to our knowledge, this is the only human cell line that produces these factors and, because it is an immortalized cell line, the factors can be produced in large quantities." (CTR 724:2-15).

5. The Defendants Did Not Inform Plaintiff Of The Unique and Valuable Properties Of His Cells.

At no time did the Defendants inform Plaintiff of the unique and valuable characteristics of his cells, nor of

their value in scientific and commercial activities, either before, at the time of, nor for over seven years after Plaintiff'[sic]splenectomy. (CTR 712:14-27). At no time did the Defendants inform Plaintiff of their intentions or activities in studying Plaintiff's cells, or in establishing cultures of his cell-line (named the "Mo-cell line" after Plaintiff's last name), nor did they request or receive any consent or permission from Plaintiff to conduct these research or commercial activities on his blood cells and tissue samples. (CTR 713:9-21).

In fact, the Defendants did not inform Plaintiff of the unique and valuable characteristics of his cells, nor of any of their medical articles, grant applications, patent applications, research agreements, or commercial contracts or income concerning his cells at any time throughout the entire course of the seven years in which Plaintiff was regularly seen by Defendants as their medical patient. (CTR 718:19-28, 719:1; 720:20-28; 721:1-16; 731:21-28, 732:1-2; 733:19-28). Whenever Plaintiff inquired as to any possible or potential value or interest his blood samples taken by the Defendants may have, or when he made inquiry concerning the nature of any research which may be performed upon those samples, the Defendants affirmatively represented to Plaintiff that there was no commercial or financial value to his blood cells, and that any research that they were performing was strictly academic and purely scientific medical research solely in connection with their efforts to determine the causes of his blood disorder (CTR 719:18-28, 720:1-19).

6. Defendants Golde, Quan and The Regents Applied For and Had Issued To Them A U.S. Patent On Plaintiff's Cells, But Did Not Inform the Plaintiff.

On or about May, 1979, Defendants Golde and The Regents initiated the University procedures by which an application for a patent on the Mo cell-line derived from Plaintiff could be prepared (CTR 723:23-28, 724:1-15). Pursuant to these efforts, Defendants Golde and others composed an abstract of invention entitled "Invention: A Unique T-Lymphocyte Line and Products Derived Therefrom, UC File: 118-79 (Golde)" which stated that Plaintiff's cells "provide either directly or indirectly, a source of the genes for the proteins of interest, which by conventional genetic engineering techniques, can be introduced into microorganisms for continuous large-scale production of the proteins." (CTR 724:16-28, 725:1).

On January 30, 1981, Defendants Golde and Quan were listed as "inventors" on a patent application filed by Defendant The Regents on the Mo cell-line extracted from the Plaintiff. By virtue of an established policy of Defendant The Regents, Defendants The Regents, Golde and Quan share in any royalties or profits resulting from licensing or contracts stemming from the patent. (CTR 726:13-21).

After filing a second application for the same patent and abandoning the first on January 6, 1983 (CTR 729:5-12), the patent was issued on March 20, 1984. The patent, entitled "Unique T-Lymphocyte Line and Products Derived Therefrom," commonly designated as the "Mo-Cell Line", bears United States Patent No. 4,438,032. The subject of the patent issued to the Defendants covers

all of the products produced by the Mo-Cell Line known to the Defendants. (CTR 735:10-28, 736:1-19; 737:4-27, 738:1-15).

Despite the fact that the five or more years involved in the patent application process took place entirely within the seven year period of Plaintiff's physician-patient relationship with Defendants Golde, Quan, and The Regents, none of those Defendants, nor any of the other named Defendants, ever informed Plaintiff that they were seeking to obtain a patent or to commercially utilize and exploit his cells for their economic benefit. As a result, Plaintiff had no basis to know of those facts until after the patent was issued, and was not provided with an opportunity to participate in or challenge those economic benefits (CTR 736:20-28, 737:1-3).

7. Defendants Golde and The Regents Negotiated And Entered Into Lucrative Contracts With the Biotechnology Firm Defendant Genetics Institute for the Commercial Development of Plaintiff's Cells, But None of the Defendants Ever Informed Plaintiff or Gave Him the Opportunity to Participate.

During the period of the ongoing physician-patient relationship and Plaintiff's periodic visits to their facilities, Defendants Golde and The Regents initiated extensive negotiations with a variety of biotechnology firms, including Defendant Genetics Institute (CTR 726:26-28, 727:1-17) by which the Defendants sought to promote the commercial development, testing, and marketing of Plaintiff's cells without his consent or knowledge.

In May, 1981, Defendants Golde, The Regents and Genetics Institute entered into a "Collaborative Research Agreement" which had as its stated primary purpose the commercial development and exploitation of Plaintiff's cells. The agreement provided for payment by Genetics Institute to Defendants Golde and The Regents of at least $330,000.00 over a three year period, in exchange for which Defendant Genetics Institute received exclusive access to Plaintiff's cells and the research being performed on them. (CTR 728:1-13). At the same time, Defendant Golde entered into a separate and distinct private agreement with Defendant Genetics Institute by which he became a paid consultant of the firm and acquired vesting rights to 75,000 shares of stock in the company for one cent per share. (CTR 727:18-28).

Throughout the entire period of time described by Plaintiff's complaint, and thereafter, neither Defendants Golde, Quan, The Regents, nor Genetics Institute ever informed Plaintiff of these commercial arrangements involving his cells or the financial interest of the various parties in the exploitation of his cells. (CTR 733:19-28).

8. The Defendants Added A Multinational Pharmaceutical Firm, Defendant Sandoz, To These Agreements To Further Their Plans To Commercially Develop and Market Products Based Upon Plaintiff's Cells, But None of The Defendants Ever Informed Plaintiff Or Gave Him the Opportunity To Participate.

In early 1982, again during the ongoing physician-patient relationship with the Plaintiff, Defendants Golde, The Regents, and Genetics Institute sought additional

funding and support from a major pharmaceutical firm to assist them in their efforts to develop and market commercial products from Plaintiff's cells. (CTR 728:14-20). Following extensive negotiations involving Defendant Golde, the Defendants entered into an agreement with the major multinational pharmaceutical firm Defendant Sandoz Ltd., parent corporation and owner of Defendant Sandoz Pharmaceuticals Corporation. By the terms of that agreement, the prior collaborative agreement was extended one year, and an additional $110,000.00 was to be paid to Defendants The Regents and Golde, enabling Defendant Sandoz to also enjoy exclusive access to Plaintiff's cells. (CTR 728:21-28, 729:1-4). The involvement of Defendant Sandoz was to be the clinical testing and marketing of products derived from Plaintiff's cells by the Defendants pursuant to their commercial agreements. Once again, Plaintiff was never informed by the Defendants of any of these facts or arrangements.

9. Defendants Genetics Institute and Sandoz Knew Or Should Have Known That The Unique Cells Which Were The Subject Of Their Commercial Agreements Came From Plaintiff Alone, And Were Obtained By Their Co-Defendants Golde and The Regents By Virtue Of Their Physician-Patient Relationship With Plaintiff.

Because of the medical journal articles, grant applications and presentations made by Defendants Golde and The Regents to the commercial Defendants regarding the unique characteristics of Plaintiff's cells and describing the source of those cells (CTR 722:4-18), and the various descriptions of Plaintiff as the source of those cells found

in the patent applications made by Defendants The Regents, Golde and Quan (CTR 724:16-23; 344: Col. 2, 45-50), Defendants Genetics Institute and Sandoz were aware that Plaintiff was a patient of Defendant Golde and was the source of the cells which were the subject of their commercial collaboration. Furthermore, because Defendants Genetics Institute and Sandoz employed Defendant Golde as a consultant at least in part because of his role as Plaintiff's physician (CTR 710:1-23), these Defendants were equally aware that their exclusive access to Plaintiff's cells and by-products was made possible by virtue of Defendants Golde and The Regents' physician-patient relationship with Plaintiff.

Defendant Golde was, in addition to being an employee and agent of Defendant The Regents, was also an employee, advisor, consultant and agent of Defendants Genetics Institute and Sandoz. Through their actions and compensation of Golde, and their acceptance of the benefits of access to Plaintiff's cells, these Defendants ratified or approved Defendants [sic] Golde's prior and present activities with regard to Plaintiff's cells. (CTR 710:6-23; 721-731).

The Defendants have applied for or have had issued to them various valuable patents based upon Plaintiff's cells (CTR 735-738), and have engaged in commercial development, testing, and marketing activities to which Plaintiff's cells were absolutely essential. (CTR 739:26-28, 740:1-20). Each of the Defendants will continue to benefit competitively and financially from their exploitation of Plaintiff's cells obtained in the context of the physician-patient relationship (CTR 741:2-17).

10. None Of The Defendants Ever Obtained Plaintiff's Informed Consent To Their Commercial Research Activities Utilizing His Unique Blood Cells.

Because the Defendants misrepresented and actively concealed from Plaintiff the value of his unique cells and their commercial activities and patents based upon the cells, Plaintiff could not possibly have given any form of implied or express informed consent to those activities.

Had the Plaintiff known of the activities of the Defendants in commercially exploiting his cell line, and of their financial interest therein, he would not have consented to or authorized their removal from his body, and would have either insisted upon participation in these activities, or, sought medical care elsewhere. (CTR 716:6-28, 717:1-15; 732:12-18; 734:11-17; and 738:20-26).

11. The Defendants Have Gained Significant Financial and Competitive Advantages In The Biotechnology Field By Their Exploitation Of Plaintiff's Cells Without His Knowledge Or Consent.

Defendants' activities in developing Plaintiff's cells were designed solely to benefit themselves financially and competitively, rather than to freely share the cells' characteristics for the benefit all of [sic] mankind.

Because of the unique properties of Plaintiff's cells, and the fact that Plaintiff was the only known source of those cells, access to Plaintiff's cells has provided the Defendants with significant financial and competitive

advantages in the highly competitive biotechnology market for therapeutic products derived from Plaintiff's cells. (CTR 721-731:1-13; 740:5-20). In fact, by virtue of the patent issued to the Defendants on Plaintiff's cells, Defendants Golde, Quan, and The Regents and their co-defendant collaborators now enjoy a commercial monopoly over those products of Plaintiff's cells (CTR 736:13-28), and the additional patent applications on Plaintiff's cells and their by-products provide the Defendants with even further financial and competitive advantages (CTR 730:7-28).

While the true commercial potential of the lymphokine products produced or made possible by Plaintiff's cells are difficult to estimate, published reports in a biotechnology industry periodical predict a potential market of approximately $3.01 billion by the year 1990 for the whole range of one type of immune system regulation, which includes the Granulocyte Macrophage-Colony Stimulating Factor (GM-CSF) which was derived by the Defendants exclusively from Plaintiff's cells. (CTR 731:1-13).

12. Plaintiff's Property Interests Have Been Damage By The Defendants Due To Their Conversion and Breach Of Duty, And Plaintiff Has Been Precluded From Receiving His Contributive Share Of The Profits Generated By The Commercial Exploitation Of His Unique Cells.

Plaintiff alleges that he has a recognizable property interest in his valuable cells and their by-products, and because he was not informed of the truth regarding the

value of his contribution to the Defendants' commercial activities, he did not provide a free and voluntary consent to their commercial use. (CTR 738:16-20). Had the Plaintiff known the true facts regarding Defendants' activities, he would have insisted upon participation in the decisions regarding the control and use of his cells, and would have sought and obtained compensation for the full value of his contribution to the Defendants' efforts to patent and commercially develop for their own profit the products of Plaintiff's cells. (CTR 738:20-26).

Because Plaintiff was kept unaware of the Defendants'commercial and financial activities in this regard, Plaintiff was unable to participate in the decision-making process concerning the utilization and dissemination of his cell line, or to seek or enter into any other economic or commercial relationship with other research institutions or commercial firms, by which he could have profited from the unique properties available from his own blood cells. Furthermore, the competitive advantage Defendants obtained by concealing their activities from Plaintiff for seven years or more, and by patenting his cell line during that period without his knowledge, at once extends their monopoly over his cells, and has the effect of further discouraging the interest of competitive parties in the biotechnology field. (CTR 730:7-28; 752:12-18). As a result, Plaintiff has suffered the loss, not only of his property interest in the living cells of his own body, but also his fair share of the profits generated by the concealed commercial activities of the Defendants to which his cells were essential. (CTR 740:21-28, 741, 742:1-7).

III. ARGUMENT

A. SUMMARY OF ARGUMENT.

The judgments of the Superior Courts dismissing Plaintiff's causes of action must be reversed. Prior wrongful intent, one of the grounds mentioned by the Superior Court in sustaining the Demurrers, is not a necessary element to be alleged to state a cause of action for conversion. The Courts' emphasis on whether Plaintiff had somehow "consented" to "medical or scientific study" overlooks the critical point that Plaintiff was never informed of the Defendants' commercial and patent activities exploiting his cells, and therefore those activities clearly exceeded any authorized use for medical treatment purposes to which Plaintiff can be presumed to have agreed.

The trial courts were also in error in finding that any deficiencies in the cause of action for conversion were somehow fatal to the entirely separate and independant remaining twelve causes of action, merely because they incorporated by reference the same general recitation of factual allegations.

Although the Superior Courts analyze only the First Cause of Action for conversion, Plaintiff will present herein argument concerning the causes of action for lack of informed consent, breach of fiduciary duty, and fraud and deceit, as they are of equal if not greater importance in this case. The long-standing common law recognition of the physician-patient relationship as imposing upon the physician the fiduciary duty of full disclosure to the patient provides the foundation for the allegations of wrongdoing in the Complaint. As the Court of Appeal

held in *Rains v. Superior Court* (150 Cal.App.3d 933 [1984]), the fiduciary nature of the physician-patient relationship dictates that the failure to fully disclose the physician's non-therapeutic purposes for a therapeutic contact with the patient vitiates that patient's consent to that medical treatment.

Furthermore, Defendants' failure to disclose their hidden commercial activities and financial interests in exploiting Plaintiff's valuable cells obtained through the physician-patient relationship constituted a breach of fiduciary duty, resulting in constructive fraud and a constructive trust. A physician-fiduciary in whom confidence is reposed is presumed to have committed fraud or exercised undue influence when the fiduciary actively participates in obtaining an economic advantage over the patient-beneficiary, as the Defendants did in this case. Furthermore, the conduct of the Defendants also amounts to actual and constructive fraud.

Plaintiff's Complaint also sets forth sufficient allegations to support causes of action for unjust enrichment, quasi-contract, bad faith, intentional infliction of emotional distress, negligent misrepresentation, intentional interference with prospective advantageous economic relationships, slander of title and accounting. These causes of action, for the most part, arise from the same legal and factual basis supporting the first four causes of action, and, it should be noted, were also not considered by the Superior Courts in sustaining the Demurrers.

While the proper application of well-recognized theories of liability is appropriate in this case despite the

admittedly novel facts alleged, it is important to remember that the law of torts is not an immutable body of rigid classifications. Therefore, the common law tradition of tort doctrine evolving with the realities of society would be maintained should the Court prefer to fashion a new remedy to prevent the breach of duties and deceptions alleged in the Complaint from being rewarded with commercial profit.

B. PLAINTIFF'S COMPLAINT SETS FORTH ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR CONVERSION.

1. Definition of the Tort of Conversion.

In 1960, the California Supreme Court defined conversion as "an act of willful interference with a chattel, done without lawful justification, by which any person entitled thereto is deprived of use and possession. (*De Vries v. Brumback*, 53 Cal. 2d 643, 647, [1960]). Conversion has also been defined as "any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." (*Pope v. National Aero Finance Co.*, 236 Cal.App.2d 722, 731, [1965], quoting *Gruber v. Pacific States Savings and Loan Co.*, 13 Cal. 2d 144, 148 [1939]).

More recently, the U.S. Court of Appeals for the Fourth Circuit has held that "conversion involves an act of control or dominion over the property that seriously interferes with the owner's rights." (*United States v. Stockton*, 788 F.2d 210, 216 [4th Circuit 1986]). The Court of Appeals emphasized that the interference with the

owner's rights can be considered tortious conversion "regardless of the manner in which the defendant obtains possession of the property" and that "a conversion can occur . . . *following the lawful entrustment of the property to the defendant.*" (emphasis added) (*Id.*, at 216, fn.5).

The key factor in the court's analysis is that the acts of dominion or appropriation must be without authorization from the owner of the property: "The notion that the act of dominion or appropriation is contrary to the wishes of the owner, or at least *without clear permission from the owner,* is inherent in the concept of conversion." (emphasis added) (*Id.*).

2. Necessary Elements of a Cause of Action for Conversion.

a. Ownership or Right to Possession of Tangible Property.

To support an action for conversion, it is not necessary that the plaintiff alleging conversion be the "owner" of the property involved. In *Igauye v. Howard,* 114 Cal.App.2d 122, (1952), the Court of Appeal held that "It is sufficient if he (the plaintiff alleging conversion) had actual possession at the time of the alleged acts." Furthermore, even actual possession is not required; it has been held that an action "may be maintained by a person who, although not in possession, had a *special interest* in the property giving him a right to possession at the time of the conversion." (emphasis added) (*Pope v. National Aero Finance Co.*, 236 Cal.App.2d 722, 731, [1965]).

b. Plaintiff Specifically Alleges Ownership and/or the Right to Possession of His Blood and Bodily Substances.

Plaintiff alleges that his blood and bodily substances are his tangible personal property (CTR 738:27-28, 739:1-5), and that he is the owner of his blood and bodily substances and of their by-products (CTR: 738:16-17).

Further allegations of Plaintiff's ownership and/or possession of his blood and bodily substances arise by plain inference from the facts set forth in the complaint including allegations that Plaintiff's blood and bodily substances and cell line were removed from his body, and therefore from his actual possession (CTR 714:23-28, 715:1; 717:16-28, 718:1-9; 736:2-4).

c. Plaintiff's Blood and Bodily Substances, as Described in the Complaint, are a Species of Tangible Personal Property Capable of Being Converted.

Proper allegation of the tort of conversion requires that the party alleging conversion must have some form of *property interest* in the subject property.

As set forth in the California Civil Code "property" can be either "real" (Civil Code §§ 657, 658) or "personal" (defined by Civil Code § 663 as anything that is not real property). Property classified as "personal" can be either "corporeal" or "incorporeal". Incorporeal personal property can be properly viewed as a legal right in legally recognized intangibles, such as rights which define "relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions

enforceable in the courts." (63 Am. Jr. 2d *Property* § 11 [1984]). Thus, the legal concept of "property" refers not to "a particular material object but to the right and interest or domination rightfully obtained over such object, with the unrestricted right to its use, enjoyment and disposition." (*Id.*).

Careful analysis of the property interests legally recognized in modern jurisprudence clearly supports the view of Plaintiff's blood and bodily substances as a species of personal property subject to conversion. As one commentator has recently observed:

> "In addition to statutory and judicial views of the human body as property, human tissue possesses characteristics that satisfy many of the criteria for establishing rights in tangible property. The human body is material in nature. (62 A Am.Jur.2d *Property* § 11 [1984]) An individual can control, exercise dominion over, and dispose of his or her body. (*Id.* at § 1) . . .
>
> Additionally, human tissue has many of the expectations that European civil law requires under the definition of property . . . "

(Comment, *Toward The Right Of Commerciality; Recognizing Property Rights In The Commercial Value Of Human Tissue*, 34 UCLA L.Rev. 208, at 218 [1987]).

i. Conversion Does Not Require Proof of Prior "Wrongful" Intent.

In sustaining the demurrer of Defendants The Regents, Golde and Quan, Judge Deering ruled that Plaintiff had not properly alleged a cause of action for conversion because Plaintiff had not alleged that the

Defendants actually knew the commercial value of Plaintiff's blood and bodily substances prior to their withdrawal, and that the Defendants actually intended to commercially exploit that value prior to that withdrawal (CTR 982-983).

Similarly, in sustaining without leave to amend the subsequent demurrers of Defendants Genetics Institute and Sandoz Pharmaceuticals Corp., the court stated that it shared Judge Deering's belief that it is "important for the Complaint to have alleged, if it be the fact, that there was no medical purpose for the removal of the spleen or the other procedures undertaken by the hospital Defendants." (CTGS 802). While this ruling is analyzed further *infra* in the discussion of exceeding authorized use as constituting conversion, it is also an apparent reference to a failure to allege Defendants' wrongful intent.

This "requirement" that Plaintiff allege a wrongful intent to state a claim for conversion is not supported by the definition set forth in the Restatement, nor by California and federal case law. Comment (b) to § 223 of the Restatement (2d) of Torts (1965) concerning the "intent" requirement states:

> "If the actor has the intent to do the act exercising dominion or control, however, *he is not relieved from liability by his mistaken belief that he has possession of the chattel or the right to possession, or that he is privileged to act.*" (emphasis added)

Restatement (2d) of Torts (1965), § 223, Comment (b), pages 436-437.

Specific recognition that a *wrongful* intent is irrelevant to a claim for conversion was first made by the

California Supreme Court in *Poggi v. Scott*, 167 Cal 372 (1914). The defendant in *Poggi* had bought a building where plaintiff's wine barrels had been stored in the cellar, and defendant, thinking that the barrels were empty and worthless except for their salvage value, sold them to a third party. Defendant had argued that because he had no way of knowing that the barrels contained plaintiff's wine, nor their true value, he could not be held liable for conversion. In rejecting defendant's argument that wrongful intent must be shown on the part of the converter, the California Supreme Court clarified the basis of the cause of action for conversion:

> "The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. . . . Therefore, *neither good nor bad faith, neither care nor negligence, neither knowledge, nor ignorance, are of the gist of the action.* (emphasis added).

(*Id.* at 375)

The Supreme Court went further in discounting the relevance of the defendant's motives, or even the degree of his negligence, in committing the conversion. The Court stated:

> "The plaintiff's right of redress no longer depends on his showing in any way that the defendant did the act in question from wrongful motives, or generally speaking, even intentionally; and hence the want of such motives, or of intentions, is no defense. Nor, indeed, is negligence any necessary part of the case. Here, then, is a class of cases in which the tort consists in the breach of what may be called an absolute duty; the act itself (in some cases it must have

> caused damage) is unlawful and redressable as a tort."

(*Id.* at 375, citing 1 Bigelow on Torts at 6)

Poggi v. Scott was reaffirmed by the California Supreme Court almost two decades later in *Edwards v. Jenkins*, 214 Cal 713 (1932). More recently, *Poggi v. Scott* has been cited with approval by the U.S. Court of Appeals for the Fourth Circuit. In *United States v. Stockton*, 788 F.2d 210 (4th Circuit 1986), a local union official embezzled funds and was sued for conversion. In clarifying the mental state necessary to be shown for conversion, the Court of Appeal, citing the U.S. Supreme Court in *Morissette v. United States*, 342 U.S. 246, 270 (1952), stated:

> "The mental state required for conversion is purely and simply a specific intent to appropriate the property. Knowledge that the property belongs to another, or that the appropriation is unauthorized by the owner, is not necessary."

(788 F.2d 210, 216).

In a footnote which cites the California Supreme Court's *Poggi* decision, the federal Court of Appeals made it clear that an action for conversion would lie even when the Defendant believed the property in question had been *abandoned* by its owner:

> "Civil liability requires a specific intent to appropriate the property. A defendant may be civily liable, however, even if he believed the property to be abandoned, *Poggi v. Scott*, 167 Cal. 372, 139, P.815 (1914), or purchased the property in good faith from a thief . . . "

(788 F.2d 210, 216 n.7).

This well-settled rule that the tort of conversion does not require a "wrongful intent" or "motive", nor even a "negligent act," has led some California Courts of Appeal to characterize the cause of action as one involving strict liability. (*Beverly Finance Company v. American Casualty Company of Reading, Penn.*, 273 Cal.App.2d 259, [1969]; *Krusi v. Bear, Stearns and Company*, 144 Cal.App.3d 664, [1983].)

Thus, plaintiff's clear allegations that the defendants intended the acts which made possible the conversion of plaintiff's blood and bodily substances for their own commercial purposes is all that the law of California requires for the "intent" aspect of conversion.

ii. The Defendants Exercised Dominion Over Plaintiff's Blood and Bodily Substances in Derogation of His Rights Therein and Excluded Him from Control.

In addition to exercising dominion and control over Plaintiff's valuable cell lines and their products, the Defendants utilized Plaintiff's unique cells for their own benefit and commercial profit in a manner which excluded Plaintiff from any participation in or control of those items and the activities based upon them. The Defendants accomplished these uses excluding Plaintiff, not only through their research and development of commercial products based on the Mo-cell line, but also through the issuance to them of patents, licensing and royalty agreements, and commercial contracts which limited exclusive access to those materials to the Defendants, as well as their carefully controlled distribution of information on and specimens of Plaintiff's cells (CTR

735:10-28, 736:2-28; 728:1-13; and 722:19-26). In fact, Plaintiff is in the ironic position of risking legal prosecution for patent infringement should he attempt to independently develop and market the valuable therapeutic products of his own cells.

d. Defendants' use of Plaintiff's Blood and Bodily Substances Clearly Exceeded Whatever Limited Authorization Was Given by Plaintiff.

The Minute Orders of the separate rulings by the Superior Court sustaining the various Demurrers also raise the question of consent or authorization by Plaintiff to the uses to which Defendants put his removed blood and bodily substances. One ground set forth by Judge Deering was Plaintiff's supposed failure to allege that he was unaware that tissue removed during his care by the Defendants might be used for medical or scientific study, as well as for diagnosis and treatment (CTR: 982). The same court further found the complaint defective in that it purportedly did not allege whether Plaintiff had consented to the removal of tissues for therapeutic purposes, or that the removal of Plaintiff's tissues was totally unrelated to therapeutic purposes. (CTR 983).

Similarly, Judge Cole's ruling sustaining the demurrers of separate defendants, in referring to and agreeing with the earlier ruling, stated that the court concurred in the belief that it was "important for the complaint to have alleged, if it be the fact, that there was no other medical purpose for the removal of the spleen or the other procedures undertaken by the hospital defendants." (CTGS 802).

The Superior Court rulings imply that once any type or level of consent is given, all subsequent activities involving the removed living cells are authorized and conversion cannot occur. However, even in a situation in which the owner or possessor of property consents to the removal of that property for a specific purpose, conversion still occurs when the recipient of the property uses it in a manner which exceeds that authorized use, or uses it in a way which seriously interferes with the original owner or possessor's right to control that property.

Over a century ago, the California Supreme Court adopted the view that an unauthorized use by a person permitted to use the property constitutes a conversion. In *Hitchcock v. McElrath*, 72 Cal. 565 (1887), the plaintiff had loaned stock to the defendant for the special purpose of raising money to pay a promissory note. The defendant, however, did not use it for that purpose, but instead converted it to his own use. The Supreme Court affirmed the judgment for plaintiff against the defendant for conversion of the stock.

The California Supreme Court has also held that an authorization or consent obtained through false representations by the actor to the owner or possessor vitiates that authorization and results in a conversion of the property involved. In *Freedman v. Queen Insurance Co. of America*, 56 Cal.2d 454 (1961), the Court further held:

> "One who by fraudulent representations induces another to surrender the possession of a chattel to him has dispossessed the other of the chattel. Assent to the actor's taking possession of the chattel given under such circumstances is ineffectual to constitute a consent to the taking . . . "

(*Id.* at 457, quoting Restatement of Torts § 221, Comment [b], [d]).

Plaintiff's complaint alleges certain written and non-written forms of limited consent to the actual physical removal of his blood and bodily substances for medical purposes, but none of these constituted either an explicit or implicit authorization of or consent to commercial exploitation of his bodily substances. Nor were these in any way authorizations of the activities undertaken by the defendants including commercial development contracts, patents, cash payments, and other activities through which they exercised dominion and control over Plaintiff's bodily substances and excluded him from that control.

i. Defendants' use of Plaintiff's Blood and Bodily Substances Exceeded the Written Consents Given by Plaintiff To Their Removal.

It is clear that none of the three written consent forms involved in the seven year history of Plaintiff's treatment in this case can be held to constitute an express authorization of the patenting and commercial use and exploitation of Plaintiff's cells by the Defendants. The first form was silent as to such use and merely authorized surgeons to remove Plaintiff's spleen (CTR 714:2-18). The second form offered on April 11, 1983 was equally silent as to such commercial use, and, to the extent that it could possibly be interpreted to incorporate a waiver of undefined "rights" to products derived from those cells, such purported "authorization" is made clearly ineffective in

light of Plaintiff's lack of constructive or actual knowledge of Defendants' commercial activities due to Defendants' non-disclosures and misrepresentations (CTR 731:14-28; 732:1-18). The third consent form, offered to Plaintiff on September 20, 1983, not only suffered from the same defects and failures to disclose those commercial activities of the Defendants, but also included a specific written indication from the Plaintiff that he did not voluntarily grant to the Defendants his rights to any cell lines or products derived from the withdrawals obtained on that occasion (CTR 733:19-28, 734:1-10; 758-759).

ii. Defendants' Activities in Patenting and Commercially Exploiting Plaintiff's Unique Cells Clearly Exceeded Whatever Authorized use Can Be Inferred from Plaintiff's Acquiescence to Their Removal in Connection with His Health Care.

Plaintiff specifically alleges that there were numerous occasions on which Plaintiff's blood and bodily substances were removed in the context of his medical care when *no* written consent or authorization for their removal and use for specific purposes was presented to or signed by the Plaintiff. (CTR 717:16-28; 731:14-20). On those numerous occasions on which no written form or explicit authorization was presented to the Plaintiff, and even on those three occasions when they were, the issue arises as to whether and to what extent Plaintiff *impliedly* consented to the clandestine patenting and commercial exploitation of his unique cells by his treating physician and that physician's commercial collaborators.

Restatement (2d) of Torts, § 228, Comment (c) instructs that the scope of the authorization given, if any, is to be determined by the terms, either express or "reasonably to be implied", of the agreement between the parties, and sets forth a "reasonable man" test for determining whether a material breach of the permitted use has occurred.

In this case, the question becomes whether a reasonable patient under these circumstances would have had any basis for knowing that removed diagnostic samples of his blood or tissues would be used as the basis for patent applications and commercial exploitation by his physician and his commercial collaborators, whether his blood and tissues were unique and adaptable to such use, and whether that use was among the purposes for which such blood and tissues are customarily used by treating physicians.

Plaintiff was never told by the Defendants, and never had any reasonable basis to believe or suspect, the true value of his blood and bodily substances, or of Defendants' activities in developing, patenting, and commercially exploiting his unique cell line. (CTR 712:14-27; 713:15-21, 23-26; 714:6-18; 718:19-27; 721:1-16, 24-28; 722:1; 731:21-28, 732:1-2; 733:19-28; 735:10-19; 736:20-28, 737:1-3; and 738:16-20).

In fact, Plaintiff's complaint describes in detail 25 facts or events, known to the Defendants throughout this period, which would have been highly relevant to Plaintiff's decision to authorize the Defendants' removals of his blood and bodily substances. Those facts include the unique nature and value of his cell line, Defendants'

activities in patenting and entering into commercial contracts for the commercial exploitation of that cell line and its products, and the present and future commercial markets and monetary amounts involved. (CTR 722:4-28, 723-730, 731:1-13; 735:10-28, 736-738:1-8). Plaintiff further alleges that had he known of these activities and of the commercial exploitation of his cell lines by the Defendants, he would not have consented to or authorized their removal from his body, and would have either insisted on participation in these activities, or sought medical care elsewhere. (CTR 716:6-28, 717:1-15; 732:12-18; 734:11-17; and 738:20-26).

Thus, it is clear that the activities of the Defendants in patenting and commercially exploiting for their own financial gain the unique cells taken from Plaintiff exceeded whatever authorized use can be inferred or implied from Plaintiff's consent to their removal for his medical care.

e. Plaintiff has Properly Alleged Damages Stemming from Defendants' Conversion of His Blood and Bodily Substances.

Civil Code § 3336 sets forth the damages recoverable for the tort of conversion of personal property:

> The detriment caused by the wrongful conversion of personal property is presumed to be:
>
> First – the value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of

prudence on his part would not have averted; and

Second – a fair compensation for the time and money properly expended in pursuit of the property.

The alternative language of the first part of CC § 3336, providing compensation for any loss "which is the natural, reasonable and proximate result" of the conversion, was recently interpreted by the Court of Appeal in *Krueger v. Bank of America*, 145 Cal.App.3d 204, (1983). (1983).

Interpreting C.C.§ 3336, the court held that the determination of damages under the alternative provision of the first section is applied "where the determination on the basis of value at the time of conversion would be manifestly unjust." (*Id.*, at 215, quoting *Myers v. Stephens*, 223 Cal.App.2d 104, at 116 [1965]).

Plaintiff's complaint clearly sets forth special circumstances in this case which warrant the application of the alternative provision of Civil Code § 3336. In addition to the general damages allegations set forth in the complaint (CTR 740:21-28; 741, 742:1-7), Plaintiff has set forth sufficient factual allegations to demonstrate that a determination of damages based on the value of the tissue and blood at the time of the original takings would be manifestly unjust.

f. Plaintiff has Properly Alleged Facts Supporting a Claim for Punitive Damages.

The award of punitive damages has been upheld in actions for the tort of conversion. In *Cyrus v. Haveson* (654

Cal.App.3d 306, 135 Cal. Rptr. 246 [1976]), a case involving eviction and conversion of personal property, the Plaintiff sought punitive damages. The Court of Appeal held that causes of action for conversion and trespass, in addition to compensatory damages, also support the award of exemplary damages. (*Id.*, at 316, citing *Farraro v. Pacific Financial Corp.*, 8 Cal.App.3d 339, 351 [1970]; *Haun v. Hyman*, 223 Cal.App.2d 615, 619-20 [1963]).

C. PLAINTIFF'S COMPLAINT SETS FORTH ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR LACK OF INFORMED CONSENT.

The well-recognized duties of disclosure imposed by the common law doctrine of informed consent are inherent in the physician-patient relationship. The complaint clearly alleges the existence of a physician-patient relationship between Plaintiff and Defendants Golde, Quan, and the Regents which continues over a seven-year period (CTR 717:16-28, 718:1).

Due to this physician-patient relationship, and because Defendants' withdrawals of Plaintiff's valuable blood and bodily substances for use in their commercial activities took place in the context of Plaintiff's medical care, each Defendant had a duty to disclose all relevant information to enable Plaintiff to make an informed decision regarding the removal and use of his blood and bodily substances.

Because Plaintiff was never told of these facts by the Defendants prior to his submission to blood and tissue withdrawals, Plaintiff never had any reasonable basis to believe or suspect the true value of his blood or bodily

substances, or of Defendants' activities and financial interests in developing, patenting, and commercially exploiting his unique cell line (CTR 712:14-27; 713:15-21, 23-26; 714:6-18; 718:19-27; 721:1-16, 24-28; 722:1; 731:21-28, 732:1-2; 733:19-28; 735:10-19; 736:20-28; 737:1-3; and 738:16-20).

The complaint describes in detail 25 facts or events, which were known to the Defendants but concealed from the Plaintiff throughout this period, which Plaintiff alleges would have been highly pertinent to Plaintiff's consent (CTR 722:4-28; 723, 730, 731:1-13; 735:10-28, 736-738:1-8). Had Plaintiff known of these activities and facts, he would not have consented to nor authorized their removal from his body, and would have either insisted upon participation in these activities, or sought medical care elsewhere (CTR 716:6-28, 717:1-15; 732:12-18; 734:11-17; and 738:20-26).

1. The Allegations of the Third Amended Complaint Set Forth a Cause of Action for Failure to Obtain Informed Consent Under Accepted Common Law Principles.

   a. The Common Law Doctrine of Informed Consent and the Fiduciary Duty of Full Disclosure.

In 1972, the California Supreme Court set forth four postulates which govern the rationale for the common law doctrine of informed consent in *Cobbs v. Grant*, 8 Cal. 3d 229 (1972):

> "The first is that patients are generally persons unlearned in the medical sciences and therefore, except in rare cases, courts may safely assume the knowledge of patient and physician are not in parody. The second is that a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment. The third is that the patient's consent to treatment, to be effective, must be an informed consent. And the fourth is that the patient, *being unlearned in medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process, thus raising an obligation in the physician that transcends arm-length transactions.*"

(emphasis added) (*Id.*, at 242).

The court found that emerging from these "axiomatic ingredients" is a "necessity, and a resultant requirement, for divulgence by the physician to his patient of all information relevant to a meaningful decisional process." (*Id.*)

The physician's duty of full disclosure arises from the fiduciary nature of the physician-patient relationship. In *Bowman v. McPheeters*, 77 Cal.App.2d 795 (1947), the court held that the "relationship between the parties of physician and patient, which in contemplation of law is a fiduciary one," imposed upon the physician-defendants the fiduciary duty to "make a full and fair disclosure to plaintiff of all facts *which materially affected his rights and interests*." (emphasis added) (*Id.*, at 800). Where there is a duty to disclose due to the fiduciary nature of the relationship, the disclosure must be "full and complete, and any material concealment or misrepresentation will amount to fraud sufficient to entitle the party injured

thereby to an action." (*Id.* at 801, quoting *Pashley v. Pacific Elec. Ry. Co.*, 25 Cal. 2d 226, at 235).

The fiduciary duty of full disclosure imposed upon a physician is not "governed by the standard practice of the physician's community", but rather has been held to be defined and imposed by the law of fiduciaries. As set forth by the Court of Appeal in *Berkey v. Anderson*, 1 Cal.App.3d 790 (1969) "to hold otherwise would permit the medical profession to determine its own responsibilities to the patients in a matter of considerable public interest." (*Id.*, at 805). Thus, the fiduciary duty of the physician is to make a full and fair disclosure to the patient of "all facts" which materially affect the patient's "rights and interests" (*Garlock v. Cole*, 199 Cal.App.2d 11, at 15 (1962), quoting *Bowman v. McPheeters*, cited *supra*, at 800).

As a result, the scope of the physician's fiduciary duty to disclose is measured not by the physician's estimation of a community standard of care, nor by what the physician thinks is necessary, but rather "by the amount of knowledge a patient needs in order to make an informed choice. All information material to the patient's decisions should be given." *Truman v. Thomas*, 27 Cal. 3d 285, at 291 (1980). Such "material information" is that "which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position" (*Id.* at 291). The extent of the disclosure duty is not determined solely by the physician's customary practice, but is "directly controlled by the unique situation of each patient," (*Brown v. Regents of University of California*, 151 Cal.App.3d 982 [1984]).

b. Due to the Fiduciary Nature of the Physician-Patient Relationship, the Scope of Disclosure is Not Limited To Physical Risks.

It is the patient who determines what factors are relevant to his or her decision to consent, and exactly which of his or her rights or interests are to be considered. Thus, "it is the prerogative of the patient, not the physician, to determine for himself the direction in which he believes his interests lie." (*Cobbs v. Grant*, cited *supra*, at 242).

The prerequisite disclosure necessary before a truly informed consent can be obtained includes *all* information which, due to the trust inherent in the relationship and the superior knowledge of the physician, is known to the physician but not to the patient and is relevant to the patient's consent.

The courts have already recognized that the duty to disclose extends to all information affecting the patient's rights and interests, and not just information regarding physicial [sic] or medical risks.

In ruling that the statute of limitations had been tolled due to the physician's non-disclosure of the true nature and causes of plaintiff's injury, the Court of Appeal in *Bowman* (77 Cal.App.2d 795) looked to the fiduciary nature of the relationship as the basis for ruling that constructive notice did not apply. In so holding, the court stated that it was the duty of the physician defendants to make "a full and fair disclosure to plaintiff of all facts which materially affected his rights and interests", including information which would have enabled the

plaintiff to pursue his *legal rights* by suing the original physician for medical malpractice. (*Bowman*, at 800).

In 1982, the California Supreme Court affirmed this view that the doctrine of constructive notice is inapplicable in the physician-patient relationship because of its fiduciary nature and resultant obligations of full and fair disclosure. In *Brown v. Bleiberg*, 32 Cal.3d 426 (1982), the Supreme Court held that the duty to disclose may thus continue even *after* the physician-patient relationship has ended:

> "[T]he standard of diligence to be expected of a former patient cannot ignore the fiduciary relationship that existed between him and his doctor. During the continuation of the relationship, courts have given plaintiffs the benefit of an 'assumption' of continued reliance so that the tolling effect of nondisclosure or concealment will also continue absent unusual circumstances which should put the patient on notice thereof. Such reliance on the fiduciary role of the physician may naturally continue after the physician-patient relationship has terminated, though."

(*Id.*, at 438, n. 9).

c. Failure to Fully Disclose the Physician's Non-Therapeutic Activities or Purposes Vitiates a Patient's Consent to Medical Treatment.

In *Rains v. Superior Court* (150 Cal.App.3d 933 [1984]), an important case which is directly on point, the Court of Appeal held that even in those situations in which a patient agrees to a course of medical treatment, if the physician has not disclosed information material to the

patient's decision, that consent is not "informed" and is vitiated by the non-disclosure or concealment. This is true even where there may be some therapeutic purpose to the proposed treatment, but there are also non-therapeutic or personal purposes known to the physician but not revealed to the patient prior to consent.

The Court of Appeal found this doctrine wholly consistent with the postulates and policy considerations set forth in *Cobbs v. Grant*, cited *supra*. In *Rains*, the plaintiffs alleged in their second amended complaint that the defendant psychiatrists had induced them to enter into a residential group psychiatric treatment program involving certain acts of physicial [sic] violence, based upon false representations of the therapeutic value and limited term of the program.

The plaintiffs alleged that the defendants committed numerous batteries and assaults upon the plaintiffs during the course of the program, and admitted that the plaintiffs had consented to the use of physical violence as an aspect of the psychiatric treatment based upon the defendants' representations that such physical abuse was "necessary to plaintiff's becoming 'cured'." (*Id.*, at 936). However, the plaintiffs further alleged that the defendants actually used the psychiatric program as a pretext to employ psychological coercion. (*Id.*).

The defendants demurred to the plaintiffs' complaint on the ground that the plaintiffs' admission of their consent to the use of violence barred their cause of action for battery, and that such consent to an offensive touching is vitiated only in those instances where the touching is different in nature from that to which consent was given.

The defendants contended that under the holding of *Cobbs v. Grant*, since the alleged violent touchings were physically identical to the contact consented to by the plaintiffs, the plaintiffs' consent was not vitiated and a cause of action for battery could not lie. (*Id.*, at 937).

The superior court sustained defendants' demurrer without leave to amend, but later allowed the filing of a third amended complaint, after striking a battery count which contained new factual allegations that no information had been given to the plaintiffs concerning the real purpose of the violence, and that the violence was not for therapeutic purposes, but was employed to control the plaintiffs in a manner which was contrary to the representations made by the defendants. (*Id.*, at 938).

In an opinion granting plaintiffs' petition for writ of mandate, authored by Presiding Justice Woods, with Justices Kingsley and Amerian concurring, the court reviewed the authorities on vitiation of consent cited in *Fleming on Torts* (4th Ed. 1971, §78, at page 78), and *Prosser on Torts* (4th Ed. 1971, §18, at page 105), and concluded that those authorities supported by analogy "the correctness of the determination that a physician's intentional misrepresentation that an otherwise offensive touching is medically necessary vitiates the consent given in ignorance of the true non-therapeutic character of the touching." (*Rains v. Superior Court*, 150 Cal.App.3d at 940).

The court dismissed defendants' contention that holding that the non-disclosure of a non-therapeutic purpose vitiates any consent obtained would impose an unfair burden upon physicians:

> "No persuasive reason is advanced by defendants, nor is any apparent to this court, why physicians, to the exclusion of all other persons, should enjoy total immunity from liability where they intentionally deceive another into submitting to otherwise offensive touching to achieve a non-therapeutic purpose known only to the physician."

(*Id.*, at 941).

The court also rejected the defendants' argument that to find that non-disclosure of a non-therapeutic versus therapeutic purpose vitiates a consent, even where the offensive contact involved is identical, would be contrary to the policy considerations set forth in *Cobbs v. Grant*. In distinguishing the factual situation in *Cobbs* from that before the court in *Rains*, the court concluded that the logical consequences of the informed consent postulates and the policy considerations set forth in *Cobbs* were equally applicable where a non-therapeutic purpose has been concealed:

> "The emphasis in *Cobbs* upon the "intentional deviation from the consent given" is wholly consistent with the analysis in the present case . . . . The *Cobbs* situation is *qualitatively distinct from that where a physician intends to perform treatment for a nontherapeutic purpose when consent was given only for a therapeutic purpose. The latter case constitutes an intentional deviation from the consent given and is even more objectionable than a physician's good faith effort to effect a cure by exceeding the precise treatment to which consent was given.*" (emphasis added)

(*Id.*, at 941-942)

The duties of disclosure inherent in the fiduciary nature of the physician-patient relationship were clearly breached by the Defendants. On a number of different occasions and in a variety of ways, the Defendants either failed to disclose, concealed, or misrepresented information to the patient regarding the value of his cell line, their successful efforts to patent that cell line, their commercial activities to exploit it, and their individual financial interests in that exploitation.

Given his unique personal situation as a patient confronting a serious medical condition, Plaintiff was entitled to rely upon the superior expertise and knowledge of the Defendants as his sole source of information regarding his cells, their commercial potential, and Defendants' activities in exploiting them.

Furthermore, the information concerning the value of Plaintiff's cells, Defendants' patent on those cells, and their commercial and financial interests in their exclusive development, would clearly be relevant to the consent decision process of a reasonable person in Plaintiff's situation. Plaintiff specifically alleges that such information, beyond being relevant to his decision, would have been determinative in guiding the manner in which he sought further medical care.

In addition to this failure to obtain an informed consent, the consents described in the complaint obtained by the Defendants from the Plaintiff were vitiated and made ineffective due to the Defendants' failure to disclose their true non-therapeutic and financial purposes. This is true even though the identical medical contacts (i.e., the clinical and/or surgical withdrawals of Plaintiff's blood and

tissues) would have been involved even if full disclosure had been made and Plaintiff had consented.

Even if the same withdrawal of samples or surgical procedure had both a therapeutic and a nontherapeutic function, Defendants' failure to disclose material information concerning their nontherapeutic activities and commercial interests vitiated whatever consent had been obtained from the Plaintiff. In this regard, it is important to note that Plaintiff specifically alleges that none of the nontherapeutic commercial activities undertaken by the Defendants utilizing his tissues and cells were ever utilized in connection with his individual health care, diagnosis, or treatment (CTR 715:10-26; 718:19-28, 719:1-17).

2. Plaintiff Sets Forth a Cause of Action for Defendants' Failure to Obtain Plaintiff's Informed Consent Under Applicable Federal Laws and Regulations Governing Federally-Funded Human Research.

In addition to the existence of a physician-patient relationship and its attendant fiduciary duty of full disclosure, the Defendants' separate research activities upon Plaintiff's cells and tissues also created a simultaneous researcher-subject relationship between the parties (albeit without Plaintiff's knowledge). Therefore, in addition to the fiduciary duties of disclosure inherent in the physician-patient relationship, this simultaneous researcher-subject relationship gives rise to the application of the even stricter standards of informed consent in human research that have been long recognized by researchers, ethicists, the medical profession, and federal and state laws.

a. The Applicable Informed Consent Requirements for Federally Funded Research Involving Humans.

During the years following the revelations of the horrors of Nazi human experimentation during World War II, scientists, physicians, and ethicists became increasingly concerned with the concept of informed consent, concluding that the duty of disclosure owed a research subject patient was even greater than that which applied to the conventional physician-patient relationship.

These concerns with informed consent in the context of human research were eventually reflected in the promulgation in 1974 by the United States Department of Health, Education and Welfare (hereinafter "DHEW") of regulations setting forth the requirements for informed consent of human subjects (39 Fed. Reg. 18,914 [1974]). These requirements applied to all research in which human subjects were involved that were supported by federal DHEW grants (45 C.F.R. §46.1 [a] [1975], *promulgated in* 39 Fed. Reg. 18,914, 18,917-20 [1974]) and remained in effect until they were superseded by the revised, current regulations in 1981 (46 Fed. Reg. 8366 [1981]).

The 1974 federal regulations required that an entity proposing to place any human subject "at risk" must obtain a "legally effective informed consent from that subject" (45 CFR §46.9 [1975], *promulgated in* 39 Fed. Reg. 18,914, 18,917-20 [1974]). "Risk" was defined as any procedure which increased "the ordinary risks of daily life" (*Id.* §46.3[b], [c], [1]). "Informed consent" was defined as:

> "Knowing consent of an individual . . . so situated as to be able to exercise free power of choice without . . . any element of . . . *fraud, deceit,* duress, or other form of constraint or coercion." (emphasis added)

(*Id.* §46.3 [c]).

The use of any exculpatory or "release" language waiving or appearing to waive any of the patient's rights was absolutely prohibited. (*Id.* §46.9).

The basic elements of an informed consent pursuant to these regulations include explanation of the *purposes* of the experiment (*Id.* §46.3 [c] [1]), and description of *"any benefits* reasonably to be expected," (*Id.* §46.3 [c] [3]). The "benefits" which must be disclosed are not qualified or limited as to nature (financial or medical) or beneficiary (researcher, subject, or other persons).

More than a year prior to Plaintiff's first contact with Defendants, in a letter dated May 27, 1975 describing several amendments to these DHEW Regulations, the Office for Protection from Research Risks of DHEW stated that it was essential to *"fully document consent with respect to any subject at any time."* (Letter, Dr. D.T. Chalkey, Office for Protection from Research Risks, National Institutes of Health, DHEW, May 22, 1975 [emphasis in original], quoted in Holder and Levine, "Informed Consent for Research on Specimens Obtained at Autopsy or Surgery: A Case Study in the Overprotection of Human Subjects", 24 *Clinical Res.* 68, 68 [1976]).

As with the regulations promulgated in 1974, the 1981 regulations prohibit the use of exculpatory language and emphasize that the patient's consent must be

obtained without coercion or undue influence (45 C.F.R. at 46-116 [1982] *promulgated in* 46 Fed. Reg. 8366, 8386-9 [1981]).

The 1981 regulations also imposed an additional element of informed consent, requiring that, when appropriate, the patient was entitled to a disclosure statement that *if and when significant new findings occurred which would be potentially relevant to the patient's willingness to continue,* such information would be provided to the patient (45 C.F.R. §46.116 [b] [5] [1982], *promulgated in* 46 Fed. Reg. 8366, 8386-91 [1981]).

b. Defendants' Withdrawal and Use of Plaintiff's Unique Cells for Research and Commercial Use Without His Informed Consent Violated Applicable Federal Regulations.

The 1974 federal regulations were applicable to the research performed by the Defendants utilizing Plaintiff's blood and bodily subtances [sic] which began in 1976. As admitted and verified in their application for the U.S. Patent on the "Mo-cell Line" composed of Plaintiff's cells (U.S. Patent No. 4,438,032, "Unique T-Lymphocyte Line and Products Derived Therefrom" granted March 20, 1984) (CTR 342-356) their research activities on the Mo-cell Line were supported by federal funding (CTR 334, Col. 1, lines 5-7). The Defendants have also published articles in medical and scientific journals regarding the Mo-cell Line indicating that research on the Mo-cell Line was supported by United States Public Health Service Grants (*See, e.g.*, Golde, Quan and Cline, "Human T-Lymphocyte Cell Line Producing Colony-Stimulating Activity,

52 *Blood* 1068 [1978] [citing support by United States Public Health Service Grants CA 15619, 15688, and RR 00865]; Saxon, Stevens and Golde, "T-Lymphocyte Variant of Hairy-Cell Leukemia, 88 *Annals Internal Med.* 323, 325 [citing support by United States Public Health Service Grant CA 12800, 15619, and 15688 and by National Institute of Health Training Grant AI 00431]).

By failing to disclose their true activities and motives to Plaintiff, the Defendants prevented Plaintiff from exercising his "free power of choice without . . . any element of . . . fraud, deceit, duress or other form of constraint or coercion." (45 C.F.R. §46.3 [c] [1975], *promulgated in* 39 Fed. Reg. 18, 914, 19,917-20 [1974]). The Defendants never revealed to Plaintiff the nature or purpose, nor even the existence of, the experimental research being performed on his blood cells (*Id.* §46.3 [c] [1]), and never described to Plaintiff the potential benefits of that research, whether in terms of Plaintiff's health or that of others, or the financial benefits to the Defendants (*Id.* §46.3 [c] [3]).

Under the 1974 federal regulations, research on pathological and diagnostic specimens, such as that performed by the Defendants on specimens of Plaintiff's surgically removed spleen and other blood and bodily substances beginning in 1976, clearly required the informed consent of the subject, as research on such surgically excised tissue is an experimental procedure related to a surgery or procedures which increased "the ordinary risks of daily life" (45 C.F.R. §46.3 [b], [c], [1], *promulgated in* 39 Fed. Reg. 18,914, 18,917-20 [1974]).

In addition to these regulations, National Institutes of Health (NIH) policy required that "that additional

informed consent be obtained to retain for research purposes an organ or fragment thereof removed at either autopsy or surgery – even when these procedures are done in accord with usual and customary medical practice." (Holder and Levine, cited *supra*, 24 *Clinical Res.* at 68 [1976]). This policy was to be applied to all NIH-supported research (*Id.* at 68); because the Defendants' research received direct NIH support, this 1975 policy was directly applicable to the Defendants' retention for research purposes of Plaintiff's surgically removed spleen.

Despite the subsequent modifications of these regulations which were promulgated in 1981, informed consent was still required for research on Plaintiff's pathological and diagnostic specimens. (45 C.F.R. §46.101 [b] [5] [1982], *promulgated in* 46 Fed. Reg. 8366, 8386-91 [1981]). The revised regulations mandated that "no investigator may involve a human being as a subject in research covered by these regulations unless the investigator has obtained the legally effective informed consent of the subject . . . " (*Id.* §46.116). The regulations define a "human subject" as "a living individual about whom an investigator . . . conducting research obtained (1) data through intervention or interaction with the individual, or (2) identifiable private information." (*Id.* §46.102 [f] [1982]).

While there are exceptions to this requirement, they are not applicable to the present case. The requirement does not apply to the study of existing pathological specimens or diagnostic specimens "if these sources are publicly available or if the information is recorded by the investigator in such a manner that subjects cannot be

identified, directly or through identifiers linked to the subjects." (*Id.* §46.101 [b] [5]).

The specimens which Defendants removed from Plaintiff's body fit neither exception. The defendants, in order to preserve their commercial interests, never made the specimens or cell lines developed from Plaintiff's blood and bodily substances publicly available until they were issued the Mo-cell line patent in 1984 (CTR 716:13-25; 722:19-22; 728:9-10; 729:1-4, 13-19; Golde "Availability of Mo and HTLV-II, 308 *Nature* 19 [1984]). Furthermore, because the cell line was labelled by the Defendants as the "Moore Cell Line" and the "Mo-Cell Line" and the Defendants published detailed case histories on Plaintiff John Moore, the specimens could be easily linked to Plaintiff Moore. (*See, e.g.*, Golde, Quan, and Cline, cited *supra*, 52 Blood 1068 [1978]; Saxon, Stevens, and Golde, cited *supra*, 88 *Annals Internal Med.* 323 [1978]).

During the period of regular blood withdrawals and research immediately following the splenectomy until 1981, the Defendants' conduct remained in violation of federal policies and regulations. Defendant Golde maintained his relationship as Plaintiff's physician and continued to conceal his research and commercial activities in which Plaintiff unknowingly played a vital and indispensable role (CTR 717:16-28; 718:1; CTR 718:19-28; 719, 720, 721:1-16). Thus, during the period the 1974 regulations and the 1975 policy were in effect and applicable to such research, the Defendants concealed the true nature of their research and concealed all of their commercial activities involving Plaintiff's blood and bodily substances (45 C.F.R. §46.3 [c] [1] (1975), *Promulgated in* 39 Fed. Reg.

18,914, 18,917-20 (1974)), never described the potential benefits of the research and commercial activities (*Id.* §46.3 [c] [3]), and never informed Plaintiff of the true purposes of the research (*Id.* §46.3 [c] [6]).

In the period following the amendment of the DHHS regulations in 1981, the Defendants continued to violate even the revised requirements. The Defendants continued to perform research on Plaintiff's diagnostic and pathological specimens, which were linked by identifiers to Plaintiff Moore's name by the use of the labels "Moore" and "Mo", without Plaintiff's knowledge or consent (45 C.F.R. §§46.101 [b], 46.116 [1982], *promulgated in* 46 Fed. Reg. 8366, 8386-91 [1981]). Defendants did not reveal to the Plaintiff the "significant new findings" regarding the cell line, its production of valuable by-products, and its commercial potential applications (*Id.* §46.116 [b] [5]), and did not reveal the existence of records identifying Plaintiff, the benefits of the research, or even the research and commercial use itself (*Id.* §46.116 [a] [1], [a] [3], and [a] [5]).

Plaintiff was first presented with written research consent forms over six years after his splenectomy, in April and September, 1983 (CTR 731:14-20; 732:24-25, 733:1-7). While the forms presented to the Plaintiff for his signature on his next-to-last and last visits to Defendants' medical facilities did indicate that research would be performed on specimens withdrawn from him on those occasions (Exhibit "A" to Plaintiff's Third Amended Complaint, CTR:758-759), those forms were in direct violation of DHHS regulations because they asked the subject to grant to the Defendants "any and all rights I, or my

heirs, may have in any cell line" or other potential products derived from the specimens (CTR 732:24-28, 733:1-7; 758). 45 C.F.R. §46.116 absolutely prohibits such waivers and provides that no informed consent, whether oral or written, may include "any exculpatory language through which the subject . . . is made to waive or appear to waive any of the subject's legal rights . . . " in the context of human research (*Id.* §46.116).

3. Plaintiff's Third Amended Complaint Sets Forth a Cause of Action for Lack of Informed Consent Under the California Protection of Human Subjects in Medical Experimentation Act.

The Protection of Human Subjects in Medical Experimentation Act of California (California Health and Safety Code, §24170 through 24179.5), passed by the California legislature in 1978, was applicable to all contacts and transactions between the Plaintiff and the Defendants during and following that year. Because the California statute is modeled largely after the similar federal regulations applicable to federally-funded human research, many of the same acts and omissions by the Defendants discussed as violations of the federal regulations *supra* also constitute violations of the California statute during the period during and after 1978 alleged in the complaint. (CTR 743:17-27).

Section 24172 of the Act sets forth an "Experimental Subjects Bill of Rights" and §24173 sets forth the requirements for "Informed Consent" in those situations in which a "medical experiment", as defined by §24174, is

being conducted. Section 24174 defines a "medical experiment" as "[t]he severance or penetration or damaging of tissues of a human subject . . . in the practice or research of medicine in a manner not reasonably related to maintaining or improving the health of such subject or otherwise directly benefiting such subject." (Health and Safety Code, §24174 [a]). Plaintiff's Third Amended Complaint specifically alleges that the research performed on Plaintiff's cells by the Defendants conducted without his knowledge or consent was not used, and was not intended to be used, in Plaintiff's actual medical care (CTR 712:21-27; 715:8-26; 717:10-15; 718:19-28, 719:12-17).

The Act also provides that subjects in such a medical experiment be provided with a copy of the "Experimental Subject's Bill of Rights" which "shall include, but not be limited to" the subject's right to be informed of the "purpose of the experiment." The subject must be "informed both verbally and within the written consent form, in non-technical terms . . . of . . . facts of the proposed medical experiment which might influence a decision to forego the experiment . . . " (Health and Safety Code §24173 (c)). Such facts specified by the statute include "the name of the sponsor or funding source, if any, . . . and the organization, if any, under whose general aegis the experiment is being conducted." (§24173[c][6])

During the visits to Defendant's facilities for blood withdrawals following the effective date of these statutes, and prior to April 11, 1983, Plaintiff was never presented with any written consent forms or "Experimental Subject's Bill of Rights" lists (CTR 717:16-28; 731:14-20). Furthermore, Plaintiff was never informed that commercial research upon his blood and bodily substances was being

funded after 1981 by the Defendants Genetics Institute and Sandoz pursuant to contracts with Defendants The Regents and Golde (CTR 728:1-13; 728:21-8; 729:1-4; 733 19-28).

Even on the occasions of Plaintiff's last two visits to Defendants' medical facilities, when forms were presented to him for his consent to participate in "research", Plaintiff was not given verbally or in writing in non-technical terms all of the important pertinent facts concerning the patenting and commercial exploitation of his cell line which may have influenced his decision to forego participation or request further information (CTR 731:21-23).

Clearly, the allegations of Plaintiff's Third Amended Complaint certainly raise triable issues of fact as to whether or not Defendants' conduct conformed to the duties of disclosure dictated by the fiduciary nature of the physician-patient relationship, as well as the more exacting duties owed to experimental subjects under applicable federal and California regulations and statutes. The Complaint sets forth more than sufficient allegations supporting a cause of action for Defendants' failure to obtain his informed consent, and therefore the rulings of Judge Deering and Judge Cole in sustaining the Defendants' special and general demurrers to this cause of action should be reversed.

D. PLAINTIFF'S COMPLAINT SETS FORTH ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS FOR A CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY.

a. The Physician-Patient Relationship is Fiduciary in Nature.

As was discussed in detail *supra* in connection with the cause of action for failure to obtain informed consent,

California courts have repeatedly recognized that the relationship between physician and patient is a fiduciary one (*Bowman v. McPheeters*, 77 Cal.App.2d 705, at 800; *Berkey v. Anderson*, 1 Cal.App.3d 790, at 804; *Garlock v. Cole*, 199 Cal.App.2d 11, at 15 [1962]). (To avoid unnecessary repetition, Plaintiff respectfully refers the court to the discussion of the fiduciary nature of the physician-patient relationship presented *supra* herein at pages 33-41).

b. As Fiduciaries, Physicians are Obligated to Render Full and Fair Disclosure to Their Patients.

Paramount among the duties of the fiduciary, and essential to the fiduciary's obligation to put the interests of the beneficiary above his or her own, is the duty of full disclosure. This duty has been recognized in all types of fiduciary relationships.

> The duty of the fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests. "Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud . . . ".

(*Neal v. Magana, Olney, Levy, Cathcart and Gelfand*, 6 Cal.3d 176, at 188-89 [1971], quoting *Pashley v. Pacific Elec. Ry. Co.*, 25 Cal.2d 226 at 235 [1944]).

Of course, the physician-fiduciary is equally obligated to make a full and fair disclosure to the patient-beneficiary of "all facts which materially affect his rights and interests." (*Garlock v. Cole*, 199 Cal.App.2d 11, at 15

[1962], quoting *Bowman v. McPheeters*, 77 Cal.App.2d 795, at 800 [1947].

In light of the detailed discussion of Plaintiff's cause of action for conversion set forth *supra* herein, it is interesting to note that the California Supreme Court has held that "[s]ince a fiduciary has a duty to make a full disclosure of facts which materially affect the rights of the parties, it seems obvious that any act by him amounting to a conversation of trust property is akin to fraudulent concealment." (*Bennett v. Hibernia Bank*, 47 Cal.2d 540, at 561).

c. All Transactions Between Physician-Fiduciaries and Patient-Beneficiaries Must Meet Strict Standards of Good Faith and Fair Dealing, and are Subject to Close Judicial Scrutiny.

The duty of the fiduciary to make full disclosure to the beneficiary is especially pronounced in the context of a transaction between the two parties. Because the fiduciary must subjugate his or her own interests to those of the beneficiary, such transactions are subject to much judicial suspicion as involving abuse of trust and undue influence.

In this case, when Plaintiff agreed to allow the Defendants to withdraw specimens of his tissues and blood based upon their representations that the sole purpose for such withdrawals was the provision of medical care for his condition, a series of "transactions" took place between the Plaintiff and the Defendants which were both induced and carried out by the Defendants in their

capacity as physician-fiduciaries. By failing to disclose or concealing their knowledge of the value of Plaintiff's unique cells, their activities in patenting and commercially exploiting those cells, and their financial interests in the result of that exploitation, the Defendants breached their fiduciary duty to Plaintiff in dramatic fashion.

As stated by the Court of Appeal in *Werschkull v. United California Bank*, 85 Cal.App.3d 981 (1978):

> It is the settled law of this state, and elsewhere, that where there exists a relationship of trust and confidence, it is the duty of one in whom the confidence is reposed to make full disclosure *of all materials facts within his knowledge relating to the transaction in question*, and any concealment of material fact is a fraud . . . any material concealment or misrepresentation will amount to fraud sufficient to entitle the party injured thereby to an action."

(*Id.*, at 1001).

In the case of physicians, it has been recognized that the "duty of good faith and fair dealing is not limited to the professional relationship, but extends to other transactions between the physician and patient." (61 Am. Jur. 2d "Physicians, Surgeons, and Other Healers", §168 [1964]). The physician's position of trust and confidence are such that "his opportunities to influence the patient are unusual"; as a result, gifts and contracts between patient and physician are subjected to careful scrutiny because of the unique relationship, and may be set aside. (*Id.*, at §168).

The California courts have long recognized the suspect nature of transactions between physicians and

patients because of the obvious potential for breach of the inherent fiduciary duties by the physician, a danger so great as to make such transactions presumptively invalid. As early as 1891, the California Supreme Court invalidated a transaction in which a defendant-physician had convinced the plaintiff to convey a deed to the physician's daughter effective only on the plaintiff's death. The court found that "there was an advantage taken of a fiduciary relation between (plaintiff's physician) and the plaintiff, and the presumption is against the validity of the transaction." (*Krose v. Hillenbrand*, 88 Cal. 473, at 474 [1891]).

In 1903, the California Supreme Court was again confronted with a transaction between a physician and patient. In the case of *In re Wickes*, 139 Cal. 195 (1903), a female patient had left her entire estate to her attending physician at the hospital where she lived the last days of her life. The court stated:

> "There is no doubt of the general principle announced, that in transactions, such as the one under consideration here (between physician and patient), which may involve an abuse of confidence, they are scrutinized with great care by the court . . . the rule rests upon the principle, that proof of such confidential relationship excites the suspicion and jealousy of the court, and casts the duty on the beneficiary, affirmatively, to satisfy the conscience of the judge that such suspicion is unfounded."

(*Id.*, at 202).

In *Cole v. Wolfskill*, 49 Cal.App.52 (1920), the decedent had executed a promissory note for $12,500 for services to the plaintiff, her physician, during her life. A beneficiary

of her estate contended undue influence. In analyzing the transaction, the Court of Appeal stated:

> "It undoubtedly is the established rule that the relation of physician and patient is confidential; and the law demands *the strictest good faith and fair dealing in all transactions arising from that relationship*. . . . once this relationship is shown to exist, all dealings between the parties will be closely scrutinized *to ascertain if the confidence of the trusting party has been betrayed* or his mind unduly influenced to his prejudice."

(*Id.*, at 54).

In such cases the burden is on the fiduciary to demonstrate that the beneficiary acted after full disclosure of that fiduciary's interest. In fact, due to the trust and confidence reposed in the physician due to the fiduciary relation, fraud or undue influence are *presumed* when the fiduciary actively participates in obtaining an economic advantage over the patient-beneficiary, especially where concealment occurs. (Cal. Prob. Code §16004 [a] and [c]; *Fish v. Security-First Nat. Bank of Los Angeles*, 31 Cal.2d 378 [1948]).

It has been stated that "when a fiduciary relationship exists and the defendant abuses the confidence of the plaintiff, both law and equity have a most tender regard for the rights of the complaining party."(*Nelson v. Gaunt*, 125 Cal.App.3d 623, at 643, citing *Werschkull v. United California Bank*, cited *supra*, at 1004).

Thus, the clear weight of authority dictates that any form of transaction arising in the context of the physician-patient relationship, in which the patient is unaware

that the physician stands to profit, as is alleged in Plaintiff's complaint, can only been viewed as an abuse of trust and a breach of the physician's fiduciary duty to the patient. This is so even if it is contended that somehow the plaintiff had "donated" the specimens of his blood and bodily substances to the defendants to facilitate his medical treatment, or, perhaps, to assist in their presumably purely academic and scientific efforts to determine the cause of plaintiff's disease.

d. Breach of Fiduciary Duty Constitutes Constructive Fraud.

In the context of a relationship of trust and confidence in which the fiduciary duty of full disclosure is well-recognized, any concealment of material facts within the fiduciary's knowledge relating to the transaction in question is fraud. (*Werschkull v. United California Bank*, cited *supra*, at 1001). Such material concealments or misrepresentations "amount to fraud sufficient to entitle the party injured thereby to an action" (*Id.*). Physicians can be liable for such fraudulent conduct like any other fiduciary. (*Nelson v. Gaunt*, 125 Cal.App.3d 623, at 635 [1981]).

Such fraud by a fiduciary has been termed "constructive fraud", which arises from a breach of duty where a relationship of trust and confidence exists. (*Darrow v. Robert A. Klein and Co.*, 111 Cal.App. 310, at 315-16 [1931]). In *Estate of Arbuckle*, 98 Cal.App.2d 562 [1950], the Court of Appeal held that:

> "In its generic sense, constructive fraud comprises all acts, omissions and concealment

> involving a breach of legal or equitable duty, trust, or confidence, and resulting in damage to another."

(*Id.*, at 568).

Thus, in the present case, because of the fiduciary duties imposed upon the defendants due to their physician-patient relationship with the plaintiff, the specific allegations that the defendants failed to provide plaintiff with full disclosure of material facts within their knowledge, constitute more than a sufficient basis for breach of fiduciary duty and constructive fraud.

e. Lack of Negligence or Dishonesty of Purpose by the Fiduciary Defendant Does Not Negate the Breech of Fiduciary Duty or Constructive Fraud.

Because of the high standard of conduct recognized by the law as being inherent in the fiduciary obligation, it is not necessary to plead or prove negligence or actual wrongful purpose when alleging breach of fiduciary duty and constructive fraud. As a result, the "requirement" set forth by Judge Deering in sustaining Defendants' demurrers that Plaintiff allege prior wrongful intent to state a cause of action is not supported by the law of fiduciary relationships.

In *Estate of Arbuckle*, cited *supra*, the Court of Appeals held that the destruction of the decedent's will by the manager of the decedent's estate was a violation of trust and confidence, despite the fact that it may have been

done in good faith, and therefore resulted in a constructive fraud upon the decedent and the beneficiaries, having all of the consequences of actual fraud. (*Id.*, at 570). The court held that "no positive dishonesty of purpose is required to show constructive fraud." (*Id.*, at 572, quoting *In re Dorrity's Will*, 118 Misc. 725, 194 NYS 573, at 575).

It is equally unnecessary to plead or prove negligence by the fiduciary, as a non-negligent fiduciary is just as capable of a breach. In *Barrett v. Bank of America*, 183 Cal.App.3d 1362 (1986), the court held that the absence of negligence on the part of a bank loan officer or the bank did not negate the breach of their fiduciary duty, and that a finding that the bank loan officer was not negligent did not preclude a finding of constructive fraud based on a breach of fiduciary duty. (*Id.*, at 21).

f. Breach of Fiduciary Duty Can Be Attributed to All Participants in a Common Plan as Aiders and Abettors.

Where there is a common plan or design to commit a tort, all who participate are jointly liable whether or not they do the wrongful acts themselves. (*Certified Grocers of California, Ltd. v. San Gabriel Valley Bank*, 150 Cal.App.3d 281, at 289 [1983], citing *Tide Water Assoc. Oil Co. v. Superior Court*, 43 Cal. 2d 815, at 827 [1955]). Furthermore, a person who is not himself a fiduciary may be liable for breach of fiduciary duty as a result of colluding with a disloyal fiduciary (*Id.*, at 289, citing *Gray v. Sutherland*, 124 Cal.App.2d 280 [1954]). This concept was recently affirmed in *Heckman v. Ahmanson*, 168 Cal.App.3d 119 (1985), in which the court held that:

> "If it [the non-fiduciary] were an active participant in the breach of duty and reaped the benefit, it cannot disclaim the burden."

(*Id.*, at 127).

Defendants Genetics Institute and Sandoz are equally liable for breach of fiduciary duty as a result of their collusion with Defendants Golde, Quan, and The Regents, their active participation, and their acceptance of the resulting commercial and competitive benefits.

g. Breach of Fiduciary Duty Entitles the Wronged Beneficiary to a Constructive Trust and Punitive Damages.

By way of damages, Plaintiff's complaint contains prayers for compensatory damages, in an amount proportionate to the value of his contributive share of the Defendants' research and commercial activities exploiting his cells, other lost profits and economic losses, as well as the products, manifestations and other products of his cells which have been and continue to be commercially developed by the Defendants (CTR 740:21-28, 741, 742, 743:1-2; 744:26-28; 717:5-15). The complaint also seeks punitive damages (CTR 742:20-28; 743:1-2).

It is well-settled that the breach of a fiduciary duty is a tort, entitling the part injured thereby to recovery of full tort damages:

> "California law is committed to the view that the fraudulent breach of fiduciary duty is a tort, and the faithless fiduciary is obligated to make good the full amount of the loss of which his breach of faith is a cause."

(*Pepitone v. Russo*, 64 Cal.App.3d 685 at 688 [1976]).

In establishing appropriate remedies for breach of fiduciary duty, courts have frequently turned to the device of the "constructive trust." The cause of action is not based on the establishment of a trust, but consists rather of the fraud, breach of fiduciary duty, or other act which entitles the Plaintiff to some relief. (Witkin, *California Procedure* [2d Edition 1971], §696, p. 2319; *Kramer v. Biddleson*, 257 Cal.App.2d 720 at 724 [1968]).

In *Heckman v. Ahmanson*, 168 Cal.App.3d 119 (1985), the court of appeal held that where there is a pre-existing fiduciary relationship between the parties, the question of an adequate remedy at law does not arise. "The court, as a court of equity, acquires jurisdiction of the action, not because damages at law would be inadequate, but because it is an action to enforce a trust . . . " arising out of the relationship (*Id.*, at 134-35, citing *Bacon v. Grosse*, 165 Cal. 481, at 493 [1913]).

The purpose of the remedy of constructive trust, the court explained, is "to prevent unjust enrichment and to prevent a person from taking advantage of his own wrong." (*Id.*, at 135). As a result, the court concluded, the plaintiff is entitled to trace the property take from him by means of the fiduciary's wrongdoing to the actual profits that property has generated as a result:

> "Thus, under a constructive trust upon money, the plaintiff is entitled to trace the fund to its ultimate product or profit."

(*Id.*)

Furthermore, where the beneficiary has been harmed by a breach of the fiduciary's duty or fraud, the remedy of punitive damages is also available. This has been held

to be equally applicable to the fiduciary duties owed by physicians to their patients. (*Nelson v. Gaunt*, 125 Cal.App.3d 623, at 643 [1981], citing *Althino v. Starr*, 112 Cal.App.3d 158, at 178 [1980]).

E. PLAINTIFF'S COMPLAINT SETS FORTH ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR FRAUD AND DECEIT.

Plaintiff's Third Amendment Complaint contains detailed allegations supporting a cause of action for actual fraud, as well as a cause of action for constructive fraud. In addition, many of the same factual allegations support Plaintiff's separate causes of action for negligent misrepresentation, unjust enrichment, quasi-contract, and intentional interference with prospective advantageous economic relationships, which are rooted in the same legal doctrines as breach of fiduciary duty and fraud and deceit.

1. Allegations Constituting the Elements of a Cause of Action For Actual Fraud.

A recital of the necessary elements required to allege a cause of action for fraud and deceit was recently set forth by the Court of Appeal in *Molko v. Holy Spirit Association for the Unification of World Christianity*, 179 Cal.App.3d 450 (1986):

> "The elements of fraud, which give rise to the tort action for deceit, are (1) misrepresentation (false representation, concealment or non-disclosure); (2) knowledge of falsity (or "scienter");

(3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage."

(*Id.*, at 464, quoting *Witkin*, Summary of California Law [8th Ed. 1974] Torts, § 446, p. 2711).

These same elements were found to be equally applicable to a situation in which a cause of action for fraud had been alleged against a physician by his patient. (*Nelson v. Gaunt*, 125 Cal.App.3d 623, at 635 [1981]).

It has recently been held that the intent required is only the intent to induce the injured party to rely or act in such a fashion as to alter his position to his detriment. In the case of *In re Cheryl E.*, 161 Cal.App.3d 587 (1984), the Court of Appeal held that "no actual intent to defraud on the part of the defendant need be shown, as fraud includes not only intentional misrepresentations but also negligent misrepresentations . . . thus, 'scienter' is not an element of every cause of action for deceit." (*Id.*, at 599).

Once again, the emphasis of Judge Deering and Judge Cole in requiring that Plaintiff allege a conscious wrongful intent on the part of the Defendants from the very inception of their relationship does not appeal to be supported by California decisional law. Nevertheless, Plaintiff's Third Amended Complaint *does* set forth allegations of wrongful intent on the part of the Defendants as well as knowledge of the falsity of their representations and the probable effect of their non-disclosures.

Detailed factual allegations containing each of the elements required to plead a cause of action for fraud and deceit are contained throughout Plaintiff's Third Amended Complaint. Factual allegations concerning misrepresentations, false representations and concealments

or non-disclosures by the Defendants concerning the value of Plaintiff's unique blood and bodily substances, Defendants' activities in developing and exploiting Plaintiff's blood and bodily substances, Defendants' efforts to patent Plaintiff's cells, and Defendants' actual financial interests in commercially exploiting those cells are contained, *inter alia*, in Plaintiff's complaint at the following paragraphs: ¶15 (CTR 712:14-27); ¶18 (CTR 713:22-26); ¶19 (CTR 714:6-10); ¶33 (CTR 718:19-28); ¶35-37 (CTR 719:18-28, 720:1-19); ¶43 (CTR 731:21-28, 732:1-2); and ¶53 (CTR 735:10-28). In fact, ¶39-41 of Plaintiff's Third Amended Complaint sets forth a detailed list of 25 facts or events concealed by the Defendants from Plaintiff throughout the period of their interaction. (CTR 721-730, 731:1-13).

Factual allegations concerning the Defendants' knowledge of the falsity of their representations are contained *inter alia* in the following paragraphs of Plaintiff's complaint: ¶8-10 (CTR 711:4-19); ¶14 (CTR 713:9-15); ¶34 (CTR 719:2-12); ¶38 (CTR 720:20-28); ¶39-40 (CTR 721:-23); ¶41 (CTR 721:24-28, 722-730, 731:1-13); ¶50 (CTR 734:1-10); and ¶53 (CTR 735:10-28).

Factual allegations regarding Defendant's intent to induce reliance are set forth in numerous paragraphs of Plaintiff's complaint, especially ¶14 (CTR 712:6-13); ¶16 (CTR 713:1-8); ¶21 (CTR 714:19-22); ¶30 (CTR 717:16-28); ¶32-34 (CTR 718:10-28, 719:1-17); ¶38 (CTR 720:20-28); ¶39 (CTR 721:1-16); ¶48 (CTR 733:8-12); ¶52-53 (CTR 734:18-28, 735 1-28); and ¶61 (CTR 739:9-25).

Factual allegations setting forth Plaintiff's justifiable reliance upon Defendants' misrepresentation and the

basis for that reliance are set forth in the following paragraphs of Plaintiff's complaint: ¶3 (CTR 708:20-28, 709:1-7); ¶5 (CTR 710:1-23); ¶12 (CTR 711:24-28); ¶16 (CTR 713:1-8); ¶38 (CTR 720:20-28); ¶20-21 (CTR 714:11-22); ¶25 (CTR 715:27-28, 716:1-5); ¶30 (CTR 717:16-24); ¶31-32 (CTR 718:6-14); ¶44 (CTR 732:3-18); ¶48 (CTR 733:8-18); and ¶52 (CTR 734:18-28, 735:1-9).

Allegations of Plaintiff's damages resulting from Defendants' fraud and deceit are set forth in ¶27-29 (CTR 716:13-28, 717:1-15), and ¶63-71 (CTR 740:21-28, 741-742, 743:1-2) of Plaintiff's complaint. Thus, Plaintiff has more than adequately alleged each of the elements required to set forth a cause of action for actual fraud, fraudulent misrepresentation, or fraud and deceit under California law.

2. Allegations Setting Forth the Elements of a Cause of Action for Constructive Fraud.

As discussed in detail *supra* herein in connection with the cause of action for breach of fiduciary duty, the existence of a relationship of trust and confidence between the patient-plaintiff and the physician-defendants, as well as their collusive aiders and abettors, makes available to Plaintiff a cause of action for constructive fraud. Constructive fraud is recognized to exist only in those situations in which a fiduciary or special relationship exists between the parties, and differs from actual fraud primarily in the degree to which the wrongful intent of the defendant is relevant. Civil Code §1573 provides for the application of constructive fraud principles:

> "(1) in any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or, (2) in any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud."

Thus, it has been held that constructive fraud includes all acts, omissions and concealments involving the breach of legal or equitable duties, trusts, or confidences, which result in damages to another. In *Barrett v. Bank of America*, 183 Cal.App.3d 1362 (1986), the Court of Appeal held that constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated – that is, in which such conduct is a constructive or quasi-fraud, having all the consequences and legal effects of actual fraud." (*Id.*, at 20, quoting *Estate of Arbuckle*, 98 Cal.App.2d 562, at 568 [1950]).

In the context of a relationship of trust and confidence, the heightened responsibility of the fiduciary, along with dependence and reliance of the beneficiary, create a situation in which even passive non-disclosure is considered constructive fraud. In *Crayton v. Superior Court*, 165 Cal.App.3d 443 (1985), the Court of Appeal considered the question of "passive concealment" as compared to "affirmative concealment" in allegations of fraud. Quoting *Prosser on Torts* (4th Ed. 1971), "Representation and Non-Disclosure", §106, page 697 the court stated:

> "The general rule is that misrepresentation by passive concealment (as opposed to affirmative concealment) violates a duty to disclose only

> where there is a special fiduciary relationship between the parties or where 'the defendant has special knowledge, or means of knowledge, not open to the plaintiff, and is aware that the plaintiff is acting under a misapprehension as to facts which would be of importance to him and would probably affect his decision.' "

(*Crayton v. Superior Court*, cited *supra*, at 451).

Therefore, in the circumstances of the present case, where the Defendants not only had specialized expertise and knowledge superior to that of the Plaintiff in the relevant scientific fields, but also were active participants in events which the Plaintiff could not have witnessed nor been aware of, and where Plaintiff's continued cooperation with the Defendants in his medical care was made possible only through his ignorance of Defendants' true commercial activities, even a "passive" failure to disclose amounts to a constructive fraud.

Once again, it is important to note, in light of the rulings by Judge Deering and Judge Cole, that allegations of dishonest purpose are not necessary to support a cause of action for constructive fraud. In *County of Santa Cruz v. McLeod*, 189 Cal. App. 2d 222 (1961), the Court of Appeal made it clear that fraudulent intent by the defendants is not a necessary element of constructive fraud:

> "Constructive fraud, as contrasted to actual fraud, may be defined as a breach of legal or equitable duty which, irrespective of the moral guilt or intent of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests."

(*Id.* at 234, quoting *Bell v. Bell*, 44 Ariz. 520).

Nor does failure to allege or prove negligence on the part of the fiduciary preclude a finding of constructive fraud in the context of a relationship of trust and confidence. (*Barrett v. Bank of America,* 183 Cal.App.3d 1362 [1986]).

i. The Corporate Defendants are Equally Liable for Fraud Where They Aided and Abetted a Breach of Fiduciary Duty by The Medical Co-Defendants, or Accepted the Benefits of That Fraud.

As demonstrated *supra* herein in the discussion of fiduciary duty, it is clear that liability for breach of fiduciary duty constituting constructive fraud can be attributed to all the participants in a collusive activity as aiders and abettors. In addition, accepting the proceeds of an actual or constructive fraud can amout [sic] to a knowing ratification that subjects a defendant collaborator to liability. (*Nicholson v. Rose,* 106 Cal.App.3d 457 [1980]).

ii. Sufficient Allegations of Damages are Presented to Support a Cause of Action for Actual or Constructive Fraud.

Because the defendants stood in a fiduciary relationship to the Plaintiff, the damages available when fraud is alleged must be measured pursuant to the broad provisions of Civil Code §333 and §1709, which govern compensation for torts in general. (*Walters v. Marler,* 83 Cal.App.3d 1 [1978]).

Furthermore, the very nature of actual or constructive fraud also supports the award of punitive damages:

> "It suffices to note that (Civil Code §3294) specifically authorizes punitive damages for "fraud, or malice, express or implied." And fraud itself implies malice. Thus, the award of punitive damages is supported by evidence of both fraud and implied malice."

(*Nicholson v. Rose*, cited *supra*, at 462).

This liability for punitive damages stemming from fraud extends equally to corporate defendants, which, like those in this case, have authorized and funded the wrongful acts constituting the fraud by their collaborators or agents, or by ratification through acceptance of the wrongfully obtained proceeds. (*O'Hara v. Western Seven Trees Corp.*, 735 Cal.App.3d 798, at 806 [1977], citing *Ebaugh v. Rabkin*, 22 Cal.App.3d 891 at 895 [1972]).

Therefore, it is clear that Plaintiff has set forth sufficient allegations to support a cause of action for fraud and deceit, be it considered actual fraud, or constructive fraud based on the breach of fiduciary duties by the Defendants and their collaborators. Therefore, the ruling of the Superior Court in sustaining Defendants' general demurrers to the fourth cause of action for fraud and deceit was in error and should be reversed.

F. PLAINTIFF'S COMPLAINT SETS FORTH SUFFICIENT ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR DECLARATORY RELIEF.

The purpose of declaratory relief is to liquidate uncertainties and controversies which may result in

future litigation (*Fagerstedt v. Continental Insurance Company*, 266 Cal.App.2d 370, at 372 [1968]), and hence, to quiet or stabilize an uncertain or disputed legal relation by permitting a prompt adjudication of the respective rights and obligations of the parties. (*Tiburon v. Northwestern Pacific Railroad Company*, 4 Cal.App.3d 160, 163 [1970]; *Lortz v. Connell*, 273 Cal.App.2d 286, 301 [1969]).

A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties and requests that these rights and duties be adjudged by the court. (*Maguire v. Hibernia Savings and Loan Society*, 23 Cal.2d 719, 728 [1944]. Because the Code of Civil Procedure, Section 1060 contains no suggestion that the plaintiff must allege facts entitling him to a favorable decision if the complaint meets the foregoing requirements, the court must declare the rights of the parties, whether or not the facts establish that plaintiff is entitled to a favorable judgment. (*Id.*, at 730; *Bennett v. Hibernia Bank*, 47 Cal.2d 540, 550 [1956]). If the Plaintiff is not entitled to a favorable determination, the court should render a judgment embodying such determination and not merely dismiss the action. For a Superior Court to sustain a demurrer to such a complaint without leave to amend or to enter judgment on the pleadings dismissing the action is error. (*Wilson v. Board of Retirement*, 156 Cal.App.2d 195, 200 [1957]; *Maguire*, cited *supra* at 731).

There currently exist uncertainties and controversies of a legal, equitable, and ethical nature raised by this case that require judicial resolution. At the center of these controversies are the duties and responsibilities owed by

the Defendants to the Plaintiff due to his status as a medical patient, an unknowing research subject, and an unwitting source of unique and commercially valuable blood cells. The nature of the property interest a human being has in his or her own living cells, especially when they possess unique properties that can be exploited commercially by a physician and his collaborators in the context of a physician-patient relationship without the patient's knowledge, is an important disputed issue raised by the facts of this case.

In light of the currently pending patent applications submitted by the Defendants on the genetic sequences encoding the unique properties of Plaintiff's cell line (CTR 730:7-20) and because product development and clinical testing are proceeding apace on the lymphokine products based upon Plaintiff's unique cells, the need for declaratory relief is great with regard to the interests of the parties herein, and grows even as this appeal is being considered.

Since the filing of this lawsuit, the important legal issues raised by this case have been the focus of debate and analysis in the legal, medical, ethical, biotechnological and legislative communities. This case has prompted at least two recent law review articles in which the issues of patients' rights and informed consent raised by the case are thoroughly explored. (Delgado and Leskovac, *Informed Consent In Human Experimentation: Bridging The Gap Between Ethical Thought And Current Practice*, 34 UCLA L.Rev. 501 [1987]; Comment, *Toward The Right Of Commerciality: Recognizing Property Rights In The Commercial Value Of Human Tissue*, 34 UCLA L.Rev. 208 [1987]).

In one of these articles, Professor Richard Delgado of the School of Law, University of California, Davis, and his co-author, Helen Leskovac, cite the instant case as an example of the courts confronting conflicts of interest in the researcher-subject and physician-patient relationships, and conclude that, just as the physician has a fiduciary relationship with the patient, the researcher has a fiduciary relationship with the human subject. (Delgado and Leskovac, cited *supra*, at 518-521, fn. 78-83, 540 *et seq.*)

In another recent law review article, the present case is used as the basis for an analysis of the various property and commercial interests involved when human tissue is utilized to become a profitable biotechnology product. The author advocates a recognition by the courts of the patient's or human source's "right of commerciality" in products developed from that person's living biological materials, especially where those materials are unique or essential to the commercial development process. (Comment, *Toward The Right Of Commerciality: Recognizing Property Rights In The Commercial Value Of Human Tissue*, cited *supra*, at 258 *et seq.*) The author concludes:

> "The advent of biotechnology has made the human body valuable property. Unfortunately, legal doctrine has yet to consider its pecuniary worth or the various rights of the parties involved in developing human cell products. Until this time, the little protection bestowed by courts has concerned only the rights of the researchers and companies involved. This places the patient in a disadvantageous and vulnerable position, thereby further compounding the inequities previously existing in the patient-researcher relationship. . . . Even without considering public opinion, equity and justice

> demand fair compensation for the patient's contribution.
>
> The courts now have the opportunity to address these inequities [citing the instant case]. The clearest way to do this is by recognizing property rights in the human body."

(*Id.*, at 263)

This case has also been the subject of a medicolegal ethics article in which a project director in medical law at the American Bar Foundation concludes that donors, recipients, and society would benefit from a legal recognition that "people's body parts are their personal property," and that individuals "have the autonomy to treat their own parts as property, particularly their regenerative parts." (Andrews, *My Body, My Property*, Hastings Center Rep., 16:5 [October 1986], 28, at 37.)

This case was instrumental in bringing about a congressional hearing on the role of patients, researchers, universities, and private companies in the development and marketing of human biological products before the Subcommittee on Investigations and Oversight of the Committee on Science and Technology of the U.S. House of Representatives on October 29, 1985. (Delgado and Leskovac, *supra*, at 519, fn. 80; CTR 970:8-16). Plaintiff herein testified at the hearing at the invitation of the Subcommittee.

In preparation for the hearing, the staff of the Subcommittee on Investigations and Oversight conducted a questionnaire survey which showed a significant and impressive rise in the use of human biological materials in research, and a substantial increase in recent years in

patent applications for products derived from human biological materials. (CTR 970:9-21; CTR 972-973).

Subcommittee Chairman Harold L. Volkmer, in presenting the results, commented that, despite this increase in the use of human patient and human subject materials in research leading to patents on biomedical products, none of the consent forms utilized and provided by the respondents included any statements informing the patient of any commercial benefits, commercial projects, or commercial rights of these patient-sources of the human biological materials. (CTR 970:24-28, 971:1-5). These data further indicate the nationwide importance and scope of the issues presented by Plaintiff's Third Amended Complaint, as well as the clear need for judicial resolution of the profound legal and ethical questions presented by this case.

As demonstrated in the discussion *supra* of the various causes of action alleged in Plaintiff's complaint and the factual allegations which support those causes of action, it is Plaintiff's position that the proper application of well-recognized theories of liability to the facts alleged in this case can remedy the wrong described. While the facts are somewhat unusual and in large measure a product of our technological era, the well-recognized legal concepts of informed consent, fiduciary duty, patients' rights, fraud, constructive trust and conversion are offered for this court's consideration as suitable vehicles for resolving the issues presented by this case.

However, should this court disagree with Plaintiff's analysis of the various specified causes of action set forth in the complaint, or find that those causes of action are

inapplicable to the unique facts presented in this case, Plaintiff respectfully reminds this Court that the law of torts is not an immutable body of rigid classifications. As Prosser has instructed, "the common thread woven into all torts is the idea of *unreasonable interference with the interests of others.*" (Prosser on Torts, §1, at 6 [4th Ed., 1971]).

In *Smith v. Superior Court of Los Angeles County*, 151 Cal.App.3d 491 (1984), the Court of Appeal observed that California has long recognized that for "every wrong there is a remedy" (Civil Code Section 3523), and California courts have allowed for new torts through the legislative and judicial processes. (*Id.*, at 496). The court recognized the historical tradition of tort law evolving and adapting with the needs and realities of society:

> "New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. . . . The law of torts is anything but static, and the limits of its development are never set. *When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant,* the mere fact that the claim is novel will not of itself operate as a bar to the remedy."

(*Id.*, at 495-96, quoting Prosser on Torts, §1, at 3-4)

This common law tradition and the principles of notice pleading are especially relevant in this appeal, in which the court is asked to review a judgment entered upon the sustaining of a general demurrer to Plaintiff's entire complaint. As the Court of Appeal stated in *Taylor*

v. S. & M. Lamp Company, 190 Cal.App.2d 700 (1961), essentially all that is necessary for plaintiff to be entitled to some relief is that his complaint has adequately alleged that his interests have been unreasonably interfered with:

> "All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief. The complaint is to be liberally construed . . . if upon a consideration of all of the facts stated it appears the plaintiff is entitled to any relief at the hands of the court against the defendant, the complaint will be held good although the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged . . . although a plaintiff may have misconceived his remedy, if his complaint states a cause of action upon any theory he is entitled to introduce evidence thereon and it is error to sustain a general demurrer or to grant a motion to exclude evidence."

(*Id.*, at 704, quoting *Domino v. Mobley*, 144 Cal.App.2d 24, 27-28 [1956] and citing *Clark v. Lesher*, 106 Cal.App.2d 403 [1951]).

Upholding the dismissal of Plaintiff's action in this closely watched case will only reassure those few biogenetic firms and physician researchers willing to transcend ethical, moral and legal boundaries for profit that they may abuse patient's rights and the public trust without penalty. It would signal that the law will look the other way and ignore the individual and property rights of patients, who, like Plaintiff, in relying on the trust inherent in the physician-patient relationship, may be subjected to the kind of deceptive practices and abuse of that

trust that are alleged herein, and which may be committed by these Defendants or others with similar intentions in the future. It would allow such breach of duty and deception to be rewarded with commercial profit, contrary to the maxim of jurisprudence, set forth in Civil Code §3517, that "(n)o one can take advantage of his own wrong."

IV. CONCLUSION

Plaintiff's Third Amended Complaint provides an astonishing insight into how the unique properties of this medical patient's cells, without his knowledge or consent, became the subject of lucrative stock deals, several patents, commercial exclusivity and secrecy agreements, and a prized commodity in the highly competitive, international biotechnology industry driven by the lure of profit.

This case concerns patient's rights, or, more specifically, the disregard of those rights by those in a position of trust and confidence as a means to advance their own design for commercial profit and competitive advantage. It is a case in which a physician and a university, and their commercial collaborators, in the context of providing medical care, abused the special trust and confidence on which patients should be entitled to rely, and exploited a seriously ill patient by taking from him, without his knowledge or consent, unique and valuable living substances which were essential to their concealed commercial activities.

These hidden commercial activities and appropriations of his cells played no role in the patient's actual health care, but were intended and carried out solely for

the financial and competitive benefit of the physician and his collaborators. Ironically, all of this took place because Plaintiff John Moore sought treatment from a physician for a rare form of blood disorder, relied on the trust inherent in the physician-patient relationship, followed his physician's request, and tried to be a cooperative patient.

Plaintiff did not invent the disturbing and important questions raised by the factual allegations set forth in his Complaint, nor did he invent the widespread concern and attention focused on this case within the legal, medical, academic, ethical, and legislative communities. While the facts may be novel, it is clear that well-established doctrines of tort liability, including conversion, informed consent, fiduciary duty, and fraud, along with the other causes of action pleaded, are clearly supported by the detailed factual allegations set forth in Plaintiff's Third Amended Complaint. The Superior Court's insistence on allegations of prior wrongful intent, absence of any therapeutic purpose, and its reliance on an undefined notion of implied consent to "medical and scientific study," clearly are not supported by decisional, regulatory, or statutory law. Therefore, Plaintiff respectfully suggests that the Superior Court rulings sustaining the general Demurrers of these Defendants to each of Plaintiff's thirteen causes of action was in error, and the dismissal of Plaintiff's Third Amended Complaint in this action and entry of judgment thereon should be reversed.

DATED: August 26, 1987

SANFORD M. GAGE
JONATHAN T. ZACKEY

GAGE, MAZURSKY, SCHWARTZ
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PROOF OF SERVICE

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COUNTY OF LOS ANGELES)

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Julie Krauss
JULIE KRAUSS

Appellate No. B021195

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

JOHN MOORE,

Plaintiff and Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC.; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICALS CORPORATION aka SANDOZ, INC. and DOES 1 through 1000, inclusive,

Defendants and Respondents.

APPELLANT'S REPLY BRIEF

Consolidated Appeal From Separate Judgments of the Superior Court of Los Angeles County
The Honorable Warren H. Deering and John L. Cole, Judges

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I. INTRODUCTION AND SUMMARY OF REPLY ARGUMENT.

Plaintiff-Appellant John Moore offers this Reply Brief in the hope of dispelling the confusion created by the five Respondents' Briefs. The Respondents have attempted to introduce unproven facts contradicted or not pled in the Complaint, to mischaracterize and misinterpret the rulings below, and to insulate themselves from liability for the wrongful conduct alleged through inapposite public policy rationales and immunities.

Despite their efforts, the basic issue involved in this appeal must remain clear. At stake is the well-recognized right of the patient to be free from commercial research and exploitation by his own physician without his knowledge or consent. At issue is whether society should reward with profit a physician who has discovered his patient is a unique source of a commercially valuable product, which the physician, his public university employer, and their for-profit commercial partners have secretly decided to exploit for personal gain without ever informing the patient or allowing him to participate. At stake in this appeal is the right of patients to decide whether or not to participate in human research, and the frightening prospect of removing that right from the patient and bestowing authority on the physician-researcher to unilaterally decide what is best for the patient, and what is best for society, as determined by the financial interests of the physician in the result, and without disclosure to the patient.

The Respondents' Briefs offer no legal, moral, or ethical basis for dismantling our society's well-settled

protection of human self-determination, or insistence on strict adherence to the duties imposed by the relationship of trust and confidence inherent in and necessary to the physician-patient relationship.

The Superior Courts' orders sustaining the demurrers and dismissing Appellant's Complaint should be reversed. The consequences of such a ruling need to be feared only by that small minority of physician-researchers and their commercial partners who view the applicable ethical guidelines and legal standards governing human research merely as impediments to personal profit.

II. REPLIES TO RESPONDENTS' ARGUMENTS.

A. RESPONDENTS' ATTEMPTS TO ALTER OR DISTORT IMPORTANT FACTUAL ALLEGATIONS OF THE COMPLAINT ARE IMPROPER AND SHOULD BE DISREGARDED AS SELF-SERVING AND MISLEADING.

Because these appeals arise from the trial courts' sustaining of demurrers to the Complaint, the issue on appeal is whether the Plaintiff has stated, or could state, a cause of action under any possible legal theory. For such purposes, all material facts pleaded in the Third Amended Complaint, and those which arise by reasonable implication, must be deemed true. (*Pollack v. Lytle* [1981] 120 Cal.App.3d 931, 936 no. 2).

The Respondents have apparently chosen to ignore this well-settled rule. Unable to argue that the facts presented totally fail to entitle the Plaintiff to any relief, Respondents have elected instead to misinterpret, modify,

distort and even alter many of the principal factual allegations contained in Plaintiff's Third Amended Complaint. Furthermore, they have distributed these efforts to mislead the court over five separate Respondent Briefs totaling 155 pages, in the mistaken hope that repetition of the extraneous (but unproven) "facts" they have substituted for the allegations of the Complaint will somehow make them "true" for purposes of appellate review.

Appellant's Opening Brief has already presented to this court a summary of the salient facts alleged in this case, along with specific line references to the text of the actual Third Amended Complaint (CTR 707-759; Appellant's Opening Brief ["AOB"] pp. 5-16). To avoid repetition and conserve the court's time, Plaintiff does not intend to respond to each and every misstatement or alteration of Plaintiff's allegations found in each of the five Respondent Briefs. Nevertheless, Appellant is mindful that the sheer volume of Respondents' mischaracterizations of Plaintiff's allegations and the record in this case may have the effect of diverting attention from the actual facts pleaded, which must be taken as true for purposes of this appeal. Therefore, what follows is an attempt to summarize, with specific line references to the Complaint, the key facts which support Plaintiff-Appellant's principal causes of action, but have been distorted in Respondents' briefs.

1. The Valuable Characteristics of Plaintiff's Cells Are Inherent, and Not the Product of Respondents' "Invention".

Plaintiff's blood cells are unique and produce substances important in the regulation of the human immune

system and do so in a manner which makes them scientifically and commercially valuable, both as a prolific natural source for those substances, and as a unique basis for artificially producing those substances in commercially useful quantities (CTR 707:25-28, 708:1-19; 722:27-28, 723:1-22; 724:2-28, 725:1).

Plaintiff's cells exhibit these unique properties naturally without the need for scientific manipulation or alteration, and continue to do so in the laboratory when actual specimens of Plaintiff's blood or tissues are cultured or grown (CTR 715:2-16; 739:26-28, 740:1-20). They are living, valuable, and unique human blood cells, and *not*, contrary to the repeated misleading assertions made by the Respondents, "diseased", "malignant", or an "unanticipated medical advancement" or "invention" created from "knowledge gained" from Defendants' "scientific investigation of diseased spleen tissue."

2. Prior to Examining Plaintiff, Respondents Were Aware That Cells With the Characteristics of Plaintiff's Cells Would Be Valuable.

At the time Plaintiff first visited the medical facilities of Defendants The Regents and Golde to confirm a blood disorder diagnosis, those Defendants, because of their expertise and familiarity with blood cells and the immune system, *were aware* that certain blood products and components would be of great value in a number of commercial and scientific efforts, and that access to a patient whose cells possessed certain unique properties would provide them with a continuous natural source of

those cells as well as commercial and scientific competitive advantages (CTR 711:4-19).

3. Respondents Arranged to Retain Quantities of and Perform Separate Non-Therapeutic Research on Plaintiff's Cells Prior to the Splenectomy.

After examining Plaintiff and confirming the diagnosis, Defendants recommended surgical removal of Plaintiff's spleen (CTR 711:24-28, 712:1-5). *Prior to Plaintiff's operation,* Defendants made arrangements to retain and grow in a separate laboratory blood cells present in the spleen tissue removed from Plaintiff so that they could be studied and used in connection with research activities which were unrelated to Plaintiff's medical care (CTR 712:6-27; 713:9-21). This executed Defendants' intention and desire to have regular access to and possession of Plaintiff's cells and their products (CTR 712:6-13).

4. Plaintiff Was Not Aware of, and Gave No Consent to, Non-Therapeutic or Commercial Research Prior to the Splenectomy.

Plaintiff was *never informed* by the Defendants of their interest in his blood cells and tissues for these separate research activities, nor was he ever informed of their intention to grow samples of his tissues and cells in a manner totally unrelated to his medical care (CTR 712:6-9, 14-27; 713:15-21, 23-26). The *only* consent obtained from Plaintiff prior to his splenectomy was a standard surgical consent form authorizing the removal of his spleen. At no time was any other use of his tissues,

nor any research or commercial activities using his cells, ever mentioned to, or discussed with Plaintiff, nor was any consent to such use obtained from Plaintiff by the Defendants (CTR 714:2-10), nor did he have any independent means of discovering those facts or plans (CTR 714:11-18; 715:27-28, 716:1-5).

5. Respondents' Separate Commercial Research Activities on Plaintiff's Cells Were Totally Unrelated to His Medical Care.

Plaintiff, who had not been advised of or asked to consent to the separate research use of his blood and tissues, signed the standard surgical consent form for the splenectomy based on representations by the Defendants that the operation was necessary for his health (CTR 714:19-22). None of the tissue samples retained and grown by the Defendants in connection with their separate research activities was ever utilized in any way in connection with Plaintiff's medical care (CTR 715:17-26).

6. 'Information on Respondents' Concealed Commercial Research Activities Would Have Been Material to Plaintiff's Consent.

Had Plaintiff been told of those activities, he would have insisted on participating in the decisions regarding the availability and use of his cells "in order to ensure that their valuable characteristics would be properly protected and preserved and made available to other research facilities and entities expert in such matters", *rather than permit Defendants to monopolize and control those*

cells solely for their personal research, commercial, and financial benefit (CTR 716:13-25). Had Plaintiff been informed of the potential value of his cells, both in terms of research and commercial development, he would have considered seeking care at other institutions where his wishes regarding their use and distribution would be respected and carried out in this regard, and would have considered seeking a proportionate financial share for his unique contribution to those commercial activities (CTR 716:26-28, 717:1-15).

Thus, the ruling of the lower court in sustaining the demurrers that Plaintiff *failed to allege* that, when he first went to U.C.L.A., he did not know or have reason to know research might be performed on tissue removed during his care, is not supported by a close reading of the facts of the Complaint or their reasonable implications. Even less supportable are Respondents' arguments that there are no allegations that research occurred in the context of Plaintiff's medical treatment, and that Plaintiff was "aware and expressly, as well as tacitly, consented to the University's separate scientific study" (as asserted, for example, in Respondent The Regents' Brief, at pp. 4-5).

7. The Focus of This Case Is a Seven-Year Physician-Patient Relationship, *Not* Just a Single Operation.

While the Respondents have gone to extraordinary lengths to argue that the only event involved in this case is the removal of Plaintiff's spleen, the fact is that Plaintiff's operation was only the beginning of a seven-year

physician-patient relationship with Defendants The Regents, Golde and Quan, during which time Defendants continued to periodically obtain large amounts of Plaintiff's blood on at least twelve separate occasions (CTR 717:16-28, 718:1).

Plaintiff was informed by the Defendants that these blood withdrawals were necessary for his medical care (CTR 718:2-9), and that they could only be performed by the Defendants at their facilities in Los Angeles, thereby directing the Plaintiff to travel from out of state on each occasion to enable them to obtain his blood (CTR 718:10-18).

The Plaintiff received no further medical or surgical treatment from Defendants other than check-ups and tests. Whether or not Plaintiff's "life was saved" by these medical actions by the Defendants, as they repeatedly proclaim in their briefs, is a matter of irrelevant speculation subject to subsequent medical proof, and in any event is nowhere alleged in the Complaint.

8. The Semiannual Blood Samples Taken Throughout This Seven-Year Period Were Important to Respondents' Commercial Efforts.

The blood withdrawals performed during these visits provided the Defendants with additional supplies of Plaintiff's cells which they cultivated and grew in connection with their independent research and commercial activities unrelated to Plaintiff's medical care (CTR 719:2-17). No informed consent, either oral or written, was ever offered to or solicited, let alone obtained, from

Plaintiff by any of the Defendants on any of these occasions until the second-to-last visit, which was almost seven years, and at least nine separate visits for blood withdrawals, later (CTR 718:19-28, 719:1; 719:18-28, 720:1; 731:14-20).

Respondents' desperate attempts to divert attention away from their activities throughout this seven-year period are misleading but understandable in light of the fact that it was during this period that they, while engaged in a continuing physician-patient and fiduciary relationship with the Plaintiff, clandestinely undertook to assess and exploit the commercial potential of Plaintiff's cells and their products, apply for a patent on those cells, enter into lucrative financial arrangements for the exclusive control and commercial development of those cells, and received present and future cash payments in return for access to those cells.

9. The Seven-Year Physician-Patient Relationship Coincided With Intensive Commercial Development of Plaintiff's Cells.

The Third Amended Complaint describes in detail at least twenty-five separate transactions or developments which occurred during this period which would have been relevant to Plaintiff (or any reasonable patient) with regard to his continued relationship with the Defendants (CTR 722-731). Despite the fact that the periodic blood withdrawals played an important role in these ongoing commercial activities, and despite the fact that the Defendants knew they were in a relationship of trust and confidence with their patient, they never disclosed to

Plaintiff, and actively concealed from him, all of these commercial activities which they were pursuing for their own personal economic advantage (CTR 720-722).

The events and activities concealed from the Plaintiff during the seven-year physician-patient relationship with the Defendants from 1976 to 1983 contradict Respondents' contention that their "academic" and "intellectual curiosity" was merely " stimulated" by the "study" of Plaintiff's "diseased spleen", prompting them to altruistically "create" or "invent" a "medical advancement" for the benefit of all mankind:

(a) The acquisition and growth of the valuable cells immediately following the Plaintiff's operation in 1976 (CTR 715:2-16);

(b) The investigation of the cells' unique properties immediately thereafter;

(c) Defendants' formal characterization of the cells as a commercially valuable and patentable phenomenon as early as May, 1979 (CTR 722:4-28, 723:1-28, 724:1);

(d) The written description by Defendant Golde of the cells as "unique" and the "only human cell line" producing lymphokines of "considerable value as reagents and ultimately as therapeutic products" in August, 1979 (CTR 724:2-15);

(e) The Defendants' preparation of a University "abstract of invention" describing the cells, their products and their commercial utility soon thereafter (CTR 724:16-28, 725:1);

(f) The initiation by the Defendants of negotiations with private for-profit biotechnology firms regarding the commercial development of the cells commencing in February, 1980 (CTR 725:2-9);

(g) The execution of a formal agreement with a biotechnology firm for commercial development of the cell line on April 23, 1980 (CTR 725:10-17);

(h) The concurrent involvement of Defendants The Regents and Golde in a federal lawsuit concerning the ownership rights to another cell line derived from a patient commencing on September 11, 1980 (CTR 725:18-28, 726:1-12);

(i) The formal application for a patent on the cell line by Defendants The Regents, Golde and Quan on January 30, 1981 (CTR 726:13-21);

(j) The initiation of negotiations between Defendants The Regents, Golde and Genetics Institute regarding exclusive access to and commercial development of Plaintiff's cells and cell products in late 1980 and early 1981 (CTR 726:26-28, 727:1-17);

(k) The execution, as a result of these negotiations, of separate stock option agreement enabling Defendant Golde to obtain 75,000 shares of Defendant Genetics Institute in exchange for his services in ensuring exclusive and continued access to Plaintiff's cells and products in early 1981, said shares being sold to Defendant Golde for a penny a share (and having a current market value of approximately $1,650,000 according to the NASDAQ listing in the *Wall Street Journal* dated March 24, 1988) (CTR 727:18-28);

(l) The execution on May 26, 1981 of a commercial contract between Defendants Golde, The Regents and Genetics Institute for the commercial development of the cell line, providing exclusive access to the cells and their products to the parties to the contract in exchange for the payment of $330,000 to Defendant The Regents (CTR 728:1-13);

(m) The search for and location of a multinational pharmaceutical firm (Defendant Sandoz Ltd.), which was added to the exclusive access and commercial development agreement extending its terms on June 4, 1982, and providing an additional $110,000 in payments to Defendants The Regents and Golde (CTR 728:21-28, 729:1-4); and

(n) The renewed application for a patent on the cell line and products filed by Defendants The Regents, Golde and Quan on January 6, 1983 (729:5-12).

10. Plaintiff Was Never Informed of the Non-Therapeutic Commercial Utilization of These Semiannual Blood Withdrawals.

Despite the fact that the Defendants obtained approximately one dozen blood withdrawals on a roughly semiannual basis during the very time that all of these activities were taking place, and the fact that the blood withdrawn on those occasions was necessary for and utilized in these commercial development activities, and was not used to improve Plaintiff's health or medical care (CTR 719:2-17), the Defendants never disclosed, and in fact actively concealed, the existence of these activities and the money involved.

In this manner, to protect their own financial interests, they totally excluded Plaintiff from any participation in the control, disposition, or proceeds of his own cells and their products. In fact, on those occasions on which Plaintiff questioned the Defendants regarding the necessity for the large blood withdrawals or their having to be taken only at U.C.L.A., Defendants affirmatively represented to Plaintiff that any studies being performed on those samples was "strictly academic and purely scientific medical research" solely with regard to the causes and potential cures of his blood disorder in the hopes of benefiting the health of Plaintiff (CTR 719:18-28, 720:1). When asked by the Plaintiff if there was any possible commercial value in the activities involving Plaintiff's blood samples, the Defendants repeatedly and affirmatively represented to him that there was no commercial value to his blood or cells, and that they had discovered nothing of commercial or financial value in his blood. In fact, the Defendants "actively discouraged such inquiries." (CTR 720:2-15).

In light of these facts, thoroughly detailed in the Third Amended Complaint, Respondents' assertion that Plaintiff somehow "consented" to the Defendants' use of his blood and cells for these concealed activities cannot be supported. The information withheld or misrepresented about the commercial exploitation of his cells would have been highly relevant, if not determinative, in Plaintiff's decisions concerning whether or not to continue to participate in those activities, and what the nature and circumstances of that participation would be (CTR 716:13-28, 717:1-15; 732:12-18; 734:11-17).

11. Respondents' Consent Forms Offered to Plaintiff In 1983 Admitted His Rights In His Cell Line and Products.

It was only after almost seven years and nearly a dozen blood withdrawals that the Defendants first presented Plaintiff with a complex form, in scientific jargon, seeking his consent to research activities limited to the blood samples withdrawn on April 11, 1983 (CTR 731:14-20; 732:24-28, 733:1-7). A copy of the form involved was attached and incorporated as Exhibit A to Plaintiff's Third Amended Complaint (CTR 758-759). (The undisputed presence of this consent form in the Clerk's Transcript makes moot the lower court's objection that it was not included in the Complaint [CTR 983]).

Any "consent" obtained by the use of the form on April 11, 1983 was clearly uninformed and invalid due to Defendants' concealment from Plaintiff of information material to his decision, and his total lack of independent knowledge to understand the meaning of the technical terms and concepts involved (CTR 731:21-28, 732:1-18).

The same form was again presented to and signed by Plaintiff on the September 20, 1983 visit (Exhibit A to the Complaint, CTR 758-759; 732:24-28, 733:1-7). This Exhibit clearly demonstrates that Plaintiff gave his unambiguous, written indication that he *did not* "voluntarily grant to the University of California any and all rights I, or my heirs, may have in any cell line or any other potential product which might be developed from the blood" withdrawn from Plaintiff on that date (CTR 758).

This document, which Respondents conveniently ignore in their versions of the facts of this case, is remarkable for three reasons:

First, the language of the form prepared by Defendants The Regents and signed by Defendant Golde (CTR 759), recognizes and asks for the waiver of the patient-subject's *rights* to a cell line or products developed from his blood, *the very right which is at the center of this case and which the Respondents now disingenuously contend is invalid and nonexistent.*

Second, because the Defendants' research was funded at least in part by federal government research grants, the form's use of exculpatory language waiving or appearing to waive any of the patient's rights is absolutely prohibited by federal regulations concerning consent to federally funded human research (45 CFR § 46-116 [1982] *promulgated in* 46 Fed. Reg. 8366, 8386-9 [1981]; see also AOB at 41-48).

Third, and perhaps most revealing, despite Plaintiff's clearly written indication that he elected *not* to waive his rights to his cell line and products, the Defendants nevertheless continued their commercial exploitation activities *using blood withdrawn from Plaintiff on that date* (CTR 734:1-10).

The sudden presentation of this consent form to Plaintiff for the first time in 1983, after nearly seven years of periodic blood withdrawals identical in nature and purpose, and equally subject to regulatory and common law requirements for fully informed consent, is easily explained by the reasonable inference that the progress of their clandestine commercial activities by the date caused

the Defendants to be especially concerned about protecting their personal financial interest in their commercial project. Just before and during early 1983, the Defendants' collaborative agreement between The Regents, Golde, Genetics Institute and Sandoz had been in existence for over two years, the renewed patent application on the cells had just been filed, the prospects for developing a profitable product were solidifying, and the patent on the cell line was about to be issued just a few months later in March, 1984.

Defendants' sudden interest in some form of "consent" or "waiver" of Plaintiff's admitted rights to the cell line and its products, however, was unfortunately not accompanied by an equally keen interest in disclosing to the patient the unique properties of his cells, Defendants' commercial activities in exploiting those properties, and the their [sic] financial interests in that exploitation.

12. Respondents Can Offer No Explanation For Their Failure to Inform Plaintiff of Their Commercial Activities Using His Unique Cells Other Than to Protect Their Economic Self-Interest.

The Respondents' briefs devote much prose to the "societal duty" of universities, researches and biotechnology firms to pursue "intellectual curiosity" and "medical advancement", but the question remains: *why were the Defendants so unwilling to share the good news that they had developed a useful and potentially immensely profitable therapeutic product with the very patient who was the sole source of the critical cells?* The only answer that can be reasonably inferred from the facts set forth in the Complaint is that

the Defendants recognized that the Plaintiff would have some claim to his contributive share, whether due to the recognition of an interest, or in the form of damages for their breach of fiduciary duty or fraud, or due to their violations of applicable human subject informed consent requirements.

Because their dishonest attempt to obtain some form of waiver from the Plaintiff failed, and now that the true nature of the commercial activities concealed from the Plaintiff during his medical care are known, the Respondents can only resort to denying *any* rights of the patient in such circumstances, and to instead argue that once adequate medical care is rendered, physicians, researchers, and their commercial collaborators have unlimited license to commercially exploit their uninformed patients.

If Respondents contend that the facts set forth in the Third Amended Complaint are incorrect, their proper recourse is through the development of competent and admissible evidence introduced in support of motions for summary judgment or dismissal. They are not entitled to attempt to introduce in their Respondent Briefs extraneous, unproven facts not pled in Plaintiff's Complaint in an attempt to distort the basis for Plaintiff's causes of action.

B. RESPONDENTS' ATTEMPTS TO MANIPULATE AND DISTORT THE FINDINGS AND RULINGS OF THE LOWER COURT SHOULD BE DISREGARDED IN FAVOR OF THE ACTUAL MINUTE ORDERS AND HEARING TRANSCRIPTS AT ISSUE IN THIS APPEAL.

Just as the Respondents have attempted to "rewrite" the facts set forth in Plaintiff's Third Amended

Complaint, they have also gone to extraordinary lengths to recast the findings and rulings of the lower court in an effort to distort the issues on appeal.

One example of this technique is Respondent Golde's strained attempt to argue that Plaintiff's election to not amend the Third Amended Complaint and seek appellate review of the various causes of action had the effect of some form of "abandonment" or "voluntary dismissal" of any causes of action arising out of the facts taking place after Plaintiff's splenectomy (Respondent Golde's Brief, pp. 7-13). This assertion is easily refuted by a careful reading of the plain language of the court's minute orders, the procedural history of this case, and the hearing transcripts.

1. The Superior Court's Demurrer Rulings Did Not Constitute a Wholesale Rejection of Each Cause of Action Alleged.

Respondents would have this court believe that the rulings of the lower court somehow constituted a wholesale adoption of all of the positions asserted in their Demurrers and their Respondent Briefs. Nothing could be further from the truth. In point of fact, the demurrers of Respondents The Regents, Golde and Quan to Plaintiff's Third Amended Complaint were sustained only as to the "first cause of action, and to the extent it (the first cause of action) is incorporated in all of the remaining causes of action . . . " (CTR 982). The court specifically stated that it was "unable to rule on all demurrers to all of the causes of action," and specifically ordered "all other demurrers off calendar without prejudice." (CTR 982-983).

Because the lengthy and specific factual allegations of the Complaint were set forth in the text of the first cause of action for conversion, the court focused its attention on the conversion cause of action *only*, and enumerated what it felt were certain defects in that cause of action. At no point was it ever suggested by the court, either in its minute order or during the hearing, that it had specifically considered and sustained each and ever general demurrer to the remaining twelve separate causes of action set forth in the Complaint.

The deficiencies found by the court in the conversion cause of action were listed in the minute order. One defect was Plaintiff's supposed failure to allege "that when he first went to U.C.L.A. he did not know or have reason to know that tissue removed during the care and treatment of patients by that facility might be used for medical or scientific study as well as for diagnosis and treatment of the patient." (CTR 982). As stated in Appellants' Opening Brief and *supra* in this Reply Brief, it is Appellant's position that such allegations *were* contained in the Complaint, that in any event there is no "implied consent" under any circumstances to human research, and the "purely academic and scientific" activities disclosed on a limited basis to Plaintiff could not have provided him a basis for a truly informed consent to commercial exploitation of his blood cells.

Judge Deering further found the conversion cause of action deficient for its supposed failure to allege that the Defendants knew of the potential commercial value of his blood and intended to exploit that value prior to its removal from the Plaintiff (CTR 982). As set forth in Appellant's Opening Brief and this Reply Brief, it is

Appellant's response that it was clearly alleged that Defendants' expertise put them in the position to recognize the value such cells would have and how beneficial it would be to have a continuous, living human source of such cells (CTR 711:4-19).

Nevertheless, since the court's objection was in the context of the sufficiency of a *conversion* cause of action, it is also Appellant's position that prior wrongful intent, or indeed any state of mind, is *not* a required element of the tort of conversion under well-established California law (AOB at pp. 22-25).

Judge Deering also identified as a deficiency Plaintiff's supposed failure to allege whether he consented to the splenectomy for therapeutic purposes, or that the splenectomy was *totally unrelated* to any therapeutic purpose (CTR 983). As set forth in Appellant's Opening Brief and in this Reply Brief, it is Appellant's position that consent to medically indicated surgical intervention does not constitute to consent to human research or commercial exploitation of a patient's cells. There are also numerous facts pled in the Complaint that various tissue and blood withdrawals described were totally unrelated to Plaintiff's medical care. Furthermore, it is also Plaintiff's position that the duty to disclose is not limited to physical risks under *Bowman v. McPheeters* (1947) 72 Cal.App.2d 795, and that failure to disclose a non-therapeutic purpose known to the physician but unknown to the patient when obtaining a consent for a therapeutic procedure vitiates that consent under the holding and rationale of *Rains v. Superior Court* (1984) 150 Cal.App.3d 933 (see discussion at AOB, pp. 33-41).

Because of the confusion resulting from a minute order which on the one hand stated that the court was unable to rule on all demurrers to all causes of action in the Complaint, and in fact ordered all other demurrers off calendar, but on the other hand sustained a demurrer to one cause of action, and "because the first 62 paragraphs are incorporated in all of the remaining causes of action" also sustained a demurrer to the first cause of action "and to the extent that it is incorporated in all of the remaining causes of action" (CTR 982), Plaintiff filed a Motion for Clarification or, in the Alternative for Reconsideration of the court's ruling (CTR 987-1001).

The resulting minute order stated that since the demurrer to the first cause of action was sustained on certain grounds, and "was incorporated into the remaining causes of action, those causes of action were defective for the same reasons." (CTR 1035). Consequently, the court ruled that it was sustaining the demurrers to the remaining causes of action "on that limited basis."

Given the clear language of these minute orders and the procedural history outlined here, it is impossible to fathom the logic of Respondent Golde in interpreting these rulings to mean that Plaintiff somehow "voluntarily dismissed" all causes of action that may have arisen out of activities subsequent to Plaintiff's splenectomy (or even out of those activities prior to and during Plaintiff's splenectomy) by electing not to amend in order to seek this appeal. As stated herein, Plaintiff's position was that either the allegations requested by the court were already in the Complaint, or the legal basis on which the court required additional allegations was incorrect.

Even the court expressed uncertainty concerning the procedural ramifications of its approach, and, more importantly, whether the court really intended its ruling to have the effect of sustaining demurrers to each of the thirteen causes of action presented. During the hearing on the general demurrers to the Third Amended Complaint of Defendants The Regents, Golde and Quan, the court stated:

> "THE COURT: It's difficult for the court to rule on a part of a cause of action. There are certain allegations in the first 62 paragraphs which I feel do not allege a cause of action as to those events. Those allegations as well as other actionable allegations are incorporated into each of the causes of action. I could have searched each cause of action to see if any cause of action on any theory was stated. And notwithstanding the (sic), what believe to be deficiencies in certain allegations, I could rule on the demurrer. I thought it might be preferable to take another route, namely, to try and get all of the allegations in my opinion properly set forth before I ruled on any of the demurrers.
>
> Do you follow what I'm saying?
>
> (intervening colloquy)
>
> THE COURT again: But what I – let me make this observation.
>
> Procedurally on a demurrer the court is not concerned whether some part of a cause of action is defective unless there is a special demurrer or motion to strike. If a cause of action or a count states a cause of action in part, because part of it is proper *then the court should overrule the demurrer. Technically that's what the court should do in this case.* Examine each of the causes of action to see if any cause of action is

> stated on any ground for any period of time from 1976 up to 1983. Certain of the demurrers are relevant to the early stages of this transaction, 1976. I thought perhaps it would be better to take another route and to point out what I thought were the deficient parts of the various counts and see if the Plaintiff wanted to amend. *It is not the best route if the Plaintiff doesn't want to amend.*"

(RTR 75-77) (emphasis added)

2. The Superior Court Indicated Agreement With Appellant's Central Contention That Nonconsensual Commercial Exploitation Is Not Privileged.

Other excerpts from the hearing transcripts confirm that the court's ruling did not reflect an absolute rejection of Plaintiff's central theories. For example, the court expressed recognition of the important distinction between a patient's unique cells and their products on the one hand, and the general advancement of medical knowledge obtained from treating a patient on the other. The court made the following statements during a discussion of these issues with counsel for Respondent The Regents:

> "MR. WAGNER (counsel for Respondent The Regents): . . . It is because of that limitation that Mr. Gage argues that what we are directing ourselves at is the cell-line of Mr. Moore. It's not the cell-line of Mr. Moore, it is the advancement that the University brought about that the University asserts a property interest in.
>
> THE COURT: *Well, if I agreed with you then I would sustain the demurrer. But I am not at all*

satisfied at this point in time that the commercial use of bodily tissue removed for care and treatment is privileged or consented to."

(RTR 72) (emphasis added)

The distinction drawn by the court was not altered by Respondents' argument that somehow research would be adversely affected if commercial exploitation of patient materials was not rewarded with profit:

"MR. WAGNER: If Your Honor were to consider the effect of it, I mean the possible results they would come about by expanding patients' interests into the incidental or independent research that gets conducted there –

THE COURT: *I am talking about living tissue being used to produce living tissue out of it. And the commercial use of that tissue. I am not speaking of knowledge gained from examining or experimenting on the tissue* itself or developing toxins or antitoxins. I am talking about the dupli (sic) – having bodily tissue reproduce itself, so to speak, into more bodily tissue of the same kind. Whether it be cells or otherwise.

MR. WAGNER: I understand, Your Honor.

THE COURT: *And I am concerned that a patient who goes into a health facility and has a substance removed from his body for care and treatment and diagnosis, and is not told at the time that that substance is also going to be used for commercial purposes, I am not at all satisfied at this time that the institution can do that. Without informing him. . . .*

. . . As I understand the Complaint in this case, rightly or wrongly, correctly or incorrectly, the Plaintiff is alleging that blood and tissue were removed from his body and it was used to

> reproduce similar tissue or some other live tissue which was commercially valuable and which was commercially handled. And he further alleges that he was not informed of the value of the tissue in a commercial sense, nor was he informed that it would be commercially used. . . .
>
> . . . All I am saying to you is repeating myself, but I believe that there may be situations, which is apparently alleged in this Complaint, that *tissue was used to reproduce additional tissue which was commercially valuable and these facts were not disclosed to the Plaintiff.*"

(RTR 72-74) (emphasis added)

With regard to the "requirement' reflected in the ruling that there must be a total absence of therapeutic purpose for a medical contact to be actionable in this context, it should be pointed out that the reasonable inference from the facts of this case is that some of the blood and tissue withdrawals produced quantities of specimens that were partially used for patient monitoring, and partially used for the ongoing commercial development of Plaintiff's cells. During the hearing on the demurrers of Respondents The Regents, Golde and Quan to Plaintiff's Second Amended Complaint, the court pointed out, and counsel for Respondent The Regents agreed, that such withdrawals of specimens for research or commercial purposes, obtained simultaneously with but beyond those absolutely necessary for medical treatment, would be actionable:

> "THE COURT: You don't deny – and I'm not saying this is a fact or isn't a fact – that *if a Defendant withdrew more blood than was needed for his care and treatment for the purpose of commercial*

utilization of that blood in some way, that that was done without the patient's consent, would be actionable.

MR. WAGNER (Counsel for Respondent The Regents): *That would be actionable,* as I understand it Your Honor, under the California Experimental Act. . . .

THE COURT: Well, as I understand the purpose underlying the Research Act, it is that if it is intended at the outset of the treatment or diagnosis of the patient that it is going to be wholly or in part experimental or research, then procedures must be complied with.

If, on the other hand, the sole intent of a surgical procedure or treatment is to treat the patient and not for experimental purposes, then the research law doesn't apply.

Am I correct?

MR. WAGNER: I would concur with that, Your Honor.

THE COURT: Okay. My question has to do with what I'll describe as, let's say, a routine medical treatment as distinguished from a research medical treatment. *A patient submits himself to the doctor for treatment and diagnosis during the course of which, from time to time, blood is withdrawn by the doctor for that purpose, for those purposes. At some point in time the doctor determines that this particular patient's blood or condition is useful for various laboratory studies and some endeavor they are undertaking of the research nature.*

So if he decided – he, the doctor, says, "Well, while I'm taking 5 ounces of blood, I might as well take ten more and I'll send it over there to this laboratory so they can pursue their own experiment," would that be invading any patient's right?

MR. WAGNER: (After some discussion) . . . But in this case I would suggest that if there's an extra withdrawal, *that extra withdrawal requires conformed* [sic] *consent for the research.*

THE COURT: *It is impermissible otherwise.*

MR. WAGNER: Subject to that statute.

THE COURT: Okay."

3. Respondents Genetics Institute and Sandoz Pharmaceuticals Corporation's Mischaracterizations of the Superior Court's Ruling Ignores the Fact That No Leave to Amend Was Granted to Plaintiff.

The argument of Respondent Sandoz Pharmaceuticals Corp. that Appellant has somehow "waived" any appellate challenge of the subsequent ruling of the superior court on the separate demurrers of itself and Respondent Genetics Institute is not supported by a close reading of the minute order involved and Appellate's [sic] Opening Brief. Appellant clearly stated in his opening brief that Appellant is seeking review and reversal of all of the rulings of the superior court in dismissing Plaintiff's Third Amended Complaint following the sustaining of Respondents' demurrers (AOB, pp. 1-4, 75).

Furthermore, Respondent Sandoz Pharmaceuticals Corp.'s contention that the judgments of dismissal in favor of itself and Respondent Genetics Institute, Inc. should be affirmed based on the holding of *Gonzalez v. State of California* ([1977] 68 Cal.App.3d 621, 635) is without merit because it relies on yet another attempt to mischaracterize the actual rulings of the trial court. As clearly stated in the minute order of Judge Cole (CTGS

801-803), the demurrers of Respondents Sandoz Pharmaceuticals Corp. and Genetics Institute were sustained *without leave to amend,* with the court specifically stating: "Normally the court would consider granting leave to amend; *it does not do so here* since there already is an appeal pending that may resolve the central issues." (Referring to the previously filed notice of appeal with respect to Respondents The Regents, Golde and Quan) (CTGS 802) (emphhasis [sic] added).

The holding of *Gonzalez,* as is made clear by the language of the case quoted in the Brief of Respondent Sandoz Pharmaceuticals Corp., applies only "when a plaintiff is given the opportunity to amend his complaint and elects not to do so". By contrast, where the court sustains demurrers *without* leave to amend, plaintiff obviously has no option to elect to decline to amend, and it cannot be presumed that the plaintiff has stated as strong a case as he can.

This is especially relevant to the consideration of the arguments of Respondents Sandoz Pharmaceuticals Corp. and Genetics Institute with regard to what they contend is the "vagueness" and "lack of specificity" of the Complaint with regard to each of them individually. It is Appellant's position that adequate allegations of wrongful acts attributable to these Respondents have been made in the complaint, as well as sufficient allegations to support imposition of liability for the prior wrongful acts of their commercial collaborators due to their aiding and abetting them in breaching their fiduciary duties to Plaintiff, and their ratification of prior acts and acceptance of the proceeds of those breaches of duty and conversion. However, Appellant wishes to remind this court that he

was not given an opportunity to remedy with greater specificity this purported deficiency in his Complaint due to the court's failure to grant leave to amend and the resultant suspension of discovery.

Appellant would also remind this court that with regard to Defendant Sandoz, Ltd., the multinational pharmaceutical firm based in Switzerland which entered into the collaborative commercial agreement with the Respondents to develop and market the cell line and its products, Appellant has timely filed a separate Notice of Appeal of a superior court ruling granting that Defendant's motion to quash for lack of personal jurisdiction. Defendant Sandoz, Ltd. is the parent corporation and owner of its subsidiary, Respondent Sandoz Pharmaceuticals Corporation.

C. CONTRARY TO THE CONTENTIONS OF RESPONDENTS GENETICS INSTITUTE AND SANDOZ, FACTS CONSTITUTING THE NECESSARY ELEMENTS OF A CIVIL CONSPIRACY HAVE BEEN PLED.

The facts pled clearly demonstrate that the joint activities of the Respondents, pursuant to commercial agreements, and as part of their common plan to commercially develop and exploit Plaintiff's cell line, constituted a civil conspiracy subjecting each of them to liability for the wrongful acts committed against Plaintiff in furtherance of their concerted efforts. It is well-settled that "joint liability does attach if a joint project to do a wrongful act is carried out and damage has resulted." (*Weatherton v. Growers Farm Labor Association* [1969] 275

Cal.App.2d 168, 175, citing 2 Witkin, *Summary of California Law*, Torts, §15).

The California Supreme Court has held that:

> "As long as two or more persons agree to perform a wrongful act, the law places civil liability for the resulting damage on all of them, regardless of whether they actually commit the tort themselves."

(*Wyatt v. Union Mortgage Company* [1979] 25 Cal.3d 773, 784, citing *Unruh v. Truck Insurance Exchange* [1972] 7 Cal.3d 616, 631).

The Supreme Court in *Wyatt* also held that the effect of alleging conspiratorial conduct is to implicate all parties who "agree to the plan to commit the wrong as well as those who actually carry it out." (*Id.*, at 784, quoting *Black v. Sullivan* [1975] 48 Cal.App.3d 557, 566). As a result, a plaintiff is entitled to damages from those defendants who "concurred in a tortious scheme with knowledge of its unlawful purpose." (*Id.*, at 784).

The Supreme Court also pointed out that the required concurrence and knowledge of the civil co-conspirators *can be established by inference from the nature of the acts done, the relationships between the parties, the interests of the conspirators, and other relevant circumstances.* (*Id.*, at 785, quoting *Chicago Title Ins. Co. v. Great Western Financial Corp.* [1968] 69 Cal.2d 305, 316).

Furthermore, the liability of a defendant for civil conspiracy *does not require that the defendant "joined the conspiracy at the time of its inception; everyone who enters into such a common design is in law a party to every act*

previously or subsequently done by any of the others in pursuance." (*DeVries v. Brumback* [1968] 53 Cal.2d 643, 648). (emphasis added)

The facts set forth in Plaintiff's Complaint clearly provide a sufficient basis for a cause of action for civil conspiracy. There is no requirement that the Plaintiff include in his Complaint a separate, enumerated cause of action explicitly alleging civil conspiracy. (*Michael R. v. Jeffrey B.* [1984] 158 Cal.App.3d 1059, 1069, citing 3 Witkin, *California Procedure* [2d Ed. 1971] Pleading, §773, p. 2839).

Certainly, Golde, The Regents, Genetics Institute, Sandoz Limited and Sandoz Pharmaceuticals Corporation agreed by written contract to perform joint activities to commercially develop and exploit Plaintiff's cell line without Plaintiff's knowledge or consent. Furthermore, the Defendants were aware that Defendants Golde and The Regents had obtained access to Plaintiff's blood cells through the creation and maintenance of a physician-patient relationship, with its inherent fiduciary duties of full disclosure (CTR 710:1-23). By accepting the competitive and financial benefits of Defendants Golde's and The Regents' breaches of their fiduciary duties to the Plaintiff, the Defendants joined the civil conspiracy and are thereby liable for every act previously or subsequently done by any of the other Defendants in pursuant of their joint commercial goals.

From the medical literature written by Defendant Golde and his colleagues regarding Plaintiff's cell line (CTR 722:4-18) as well as from the patent application filed by Defendants Golde, Quan, and The Regents on the cell

line (which was filed prior to the commercial agreements with Defendants Genetics Institute and Sandoz) (CTR 726:13-21; 344, col. 2, lines 45-47), Defendants Genetics Institute and Sandoz knew or should have known that the source of the cell line which was the object of their commercial efforts had been obtained by Defendants Golde and The Regents through their access to Plaintiff's blood and bodily substances due to their physician-patient relationship with him. These Defendants also knew or should have known that Defendant Golde and Defendant The Regents had not informed the Plaintiff of any aspect of these commercial activities nor of the value of his cells.

D. CONTRARY TO RESPONDENTS' CONTENTIONS, PLAINTIFF'S COMPLAINT SETS FORTH ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS OF AN AGENCY OR JOINT VENTURE RELATIONSHIP AMONG DEFENDANTS.

Plaintiff's Third Amended Complaint clearly sets forth facts which support a characterization of the relationships and activities among the Defendants in this case as agency, joint venture/enterprise and/or ratification among the Defendants. The Complaint clearly alleges the creation of written, formal commercial agreements and financial arrangements which were entered into by the Defendants in furtherance of their joint goal of developing and commercializing products derived from Plaintiff's unique blood and bodily substances.

As a result, the relationship among these Defendants can be described as either an agency or a joint venture/

enterprise causing vicarious liability or the imputation of the acts of one to each of the other Defendants.

By agreeing to pay Defendants Golde and The Regents specified sums of money for both their continued activities utilizing Plaintiff's blood and bodily substances and for exclusive access to those substances themselves and the research performed upon them, and by hiring Defendant Golde as a paid consultant, Defendants Sandoz and Genetics Institute created what could best be described as a principal-agent relationship with Defendants Golde and The Regents. Therefore, they became vicariously liable for those acts and omissions committed by Defendants Golde and The Regents within the scope of the agency. Civil Code § 2338 provides that:

> "[A] principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business . . . "

Because Defendant Golde needed to have and maintain a physician-patient relationship with Plaintiff throughout the period described in the Complaint in order to continue to have access to Plaintiff's blood and bodily substances, and since those blood and bodily substances were essential to the commercial and research activities specified in the contracts among the parties, it is clear that Defendant Golde's actions, concealments, representations and misrepresentations were clearly negligent or intentional acts committed by Defendant Golde in and as a part of the "transaction" of these commercial plans. Golde's conduct was clearly in furtherance of the business of the agency and therefore, as their agent, his

liability can be imputed vicariously to his principals, including Defendants Genetics Institute and Sandoz Pharmaceuticals Corporation.

Another characterization of the relationship among the Defendants, which also leads to the imputation of liability for wrongful acts to each of the other Defendants, is that of joint enterprise. A joint enterprise or venture:

> "is an undertaking to carry out a small number of acts or objectives, which is entered into by associates under such circumstances that all have an equal voice in directing the conduct of the enterprise. The law then considers that each is the agent or servant of the others, and that the act of anyone within the scope of the enterprise is to be charged vicariously against the rest."

W. Keeton, *Prosser and Keeton on the Law of Torts* (1984) § 72, at 516-517.

The existence of such an enterprise *is usually a question for the jury, and as such is an issue of fact, not an issue of law to be determined on the pleadings or by demurrer.* (*Id.*). Therefore, even if it is argued that the relationship among these Defendants does not fit squarely within the definition of a principal-agent relationship, it is still clear that the written contracts in existence among these Defendants clearly created a joint venture which would make each participant vicariously liable for wrongful acts carried out by other participants in furtherance of that joint venture. The activities of Defendants Golde, Quan, and The Regents in converting Plaintiff's blood and bodily

substances, failing to obtain informed consent from Plaintiff, breaching their fiduciary duty to Plaintiff, committing fraud and deceit upon Plaintiff, and unjustly enriching themselves thereby, are equally attributable to Defendants Genetics Institute and Sandoz Pharmaceuticals Corporation because those actions were committed as part of the joint venture among all the Defendants to commercially develop Plaintiff's cells.

E. CONTRARY TO RESPONDENTS' CONTENTIONS, PLAINTIFF'S COMPLAINT SETS FORTH FACTS SHOWING RATIFICATION OF THE WRONGFUL ACTS COMMITTED BY DEFENDANTS THE REGENTS, GOLDE, AND QUAN PRIOR TO THE EXECUTION OF THE WRITTEN COLLABORATIVE AGREEMENTS BY DEFENDANTS GENETICS INSTITUTE AND SANDOZ.

Respondents Genetics Institute and Sandoz Pharmaceuticals Corporation have argued that they cannot be held accountable for actions taken prior to their addition to the collaborative agreements between Defendants Golde, The Regents, and themselves regarding the commercial exploitation of Plaintiff's cells. Respondents' argument in this regard ignores the fact that their addition to those agreements operated as a ratification by them of the prior acts of the co-defendants in furtherance of their shared commercial activities. Civil Code § 2310 provides:

> "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where

> an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof."

Clearly, the written agreements specifically alleged in Paragraphs 41(o), (p), (q), and (r) of the Complaint (CTR 728, 729:1-4) demonstrate that the written collaborative agreements were in the same "manner" as would have been necessary to confer an original authority for the commercial development of the cell line extracted from Plaintiff by Defendants Golde and The Regents. Furthermore, Defendants Genetics Institute and Sandoz, by "accepting and retaining the benefit" of exclusive access to Plaintiff's blood and bodily substances, and the commercial advantages and profits flowing therefrom made possible by the wrongful acts of Defendants Golde and The Regents, and by retaining the benefits of those actions in furthering their own commercial activities, ratified and adopted those acts in furtherance of this scheme which preceded the execution of these written agreements.

F. RESPONDENTS THE REGENTS, GOLDE AND QUAN'S CLAIM OF IMMUNITY SHOULD BE REJECTED.

It has been repeatedly held in California that, in determining the applicability of immunities to a defendant's wrongdoings in a tort action, "when there is negligence, the rule is liability, immunity the exception." (*Muskopf v. Corning Hospital District* [1961] 55 Cal.2d 211, at 219). In accord with the principle, it has also been frequently held that "courts should not casually decree

governmental immunity." (*Johnson v. State* [1968] 69 Cal.2d 782, at 798).

In this regard, "the Government Tort Claims Act is to be construed accordingly" (*Meyer v. City of Oakland*, [1980] 107 Cal.App.3d 770, at 778) and "[u]nless the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail." (*Ramos v. County of Madera* [1971] 4 Cal.3d 685, at 692).

Respondent [sic] The Regents, Golde and Quan's claims of immunity on the grounds of public entity or public employee immunity erroneously misinterpret the statutory scheme set forth in Government Code §§815.2, 818.8 and 822.2, misconstrue the true meaning of Plaintiff's clear allegations and Causes of Action, and then misapply the law.

Government Code, §815.2 provides, in its entirety:

> "(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.
>
> (b) Except as otherwise provided by statute a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

The effect of this section is to impose upon public entitles [sic] "vicarious liability for the tortious acts and

omissions of their employees." (*Senate Legislative Committee Comment, Government Code Section 815.2*). Because this section of the Code provides that in the absence of a statute a public entity cannot be held liable for an employee's act or omission where the employee himself would be immune, this statute must be applied in conjunction with a close reading of Government Code §§818.8 and 822.2 which deal with liability for "misrepresentations" by employees of public entities.

Government Code §818.8 provides, in its entirety, that:

> "A public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional."

Government Code §822.2 provides, in its entirety, that:

> "A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, *unless* he is guilty of actual *fraud*, corruption or malice." (emphasis added)

In *Schonfeld v. City of Vallejo*, ([1975]) 50 Cal.App.3d 401), the Court of Appeal was confronted with an interpretation of the words "actual fraud, corruption or actual malice"in Government Code §822.2. The court saw "merit" in the City's contention that "actual fraud" in that statute "must be construed to mean 'fraud and malice' based on personal malevolence *or wrongful purpose.*" (*Schonfeld v. City of Vallejo, supra*, at 409). The court held that, in order to impose liability on a public employee,

something greater than common law deceit must be present, such as "actual malice" which the court defines as *"a conscious intent to deceive,* vex, annoy or harm the injured party in his business." (*Schonfeld* at 410). In so holding, the court, in a footnote, refers to Penal Code, § 7 which defines "malice", not exclusively as "a wish to vex, annoy or injure another person", but also and in the alternative as *"an intent to do a wrongful act."* (*Schonfeld,* footnote 9, at 410).

In asking this court to immunize these Respondents from the consequences of their wrongful acts as specifically set forth in Plaintiff's allegations, Respondents erroneously misinterpret this statutory scheme, and attempt to mislead this court concerning the true meaning of Plaintiff's clear allegations by asserting that all of Plaintiff's causes of action are dependent upon a finding of intentional or negligent misrepresentation, and that no cause of action for medical negligence has been alleged. Neither of these assertions is true, nor do they have any basis in the clear language of Plaintiff's Third Amended Complaint.

1. Eleven of Plaintiff's Thirteen Separate Causes of Action Do Not Involve Misrepresentation as a Necessary Element, and the Complaint Specifically Alleges Defendants' Conscious Intent to Deceive.

Under the Code section and case law summarized above, the only way that The Regents as a governmental entity would be immune from liability due to the acts of public employees Golde and Quan would be if Plaintiff's Complaint alleged simple common law deceit, and did

not allege Defendants' conscious intent to deceive. Furthermore, the only way in which public employees Golde and Quan could be immune from liability, due to their misrepresentations, would be if Plaintiff's Complaint did not allege that their misrepresentations were motivated by a conscious intent to deceive.

Contrary to Respondents' erroneous assertions, it is clear from Plaintiff's Third Amended Complaint that eleven of Plaintiff's thirteen causes of action do not require, as necessary elements, simple common law deceit or simple misrepresentation. As set forth in Appellant's Opening Brief and the Complaint, Plaintiff's causes of action for conversion, informed consent, breach of fiduciary duty, unjust enrichment, quasi-contract, bad faith breach of the implied covenant of good faith and fair dealing, intentional infliction of emotion distress, intentional interference with prospective advantageous economic relationships, slander of title, accounting, and declaratory relief *do not* rely on any allegations of simple common law deceit in the total absence of Defendants' conscious intent to deceive, nor is the element of simple misrepresentation required to adequately plead those causes of action.

Furthermore, Plaintiff's cause of action for fraud and deceit, specifically alleges Defendants' misrepresentations, Defendants' knowledge of the falsity of those misrepresentations, Defendants' *intent to defraud and induce reliance*, Plaintiff's justifiable reliance upon Defendants' misrepresentations made with the *intent to deceive and to induce Plaintiff to rely* to their benefit, and Plaintiff's resultant damage (AOB 59-66). By any interpretation, such allegations go far beyond simple common law deceit, and

more than sufficiently allege Defendants' "conscious intent to deceive" Plaintiff, and thereby remove such conduct, under *Schonfeld, supra,* from immunity under Government Code, §822.2.

Therefore, because eleven of the thirteen causes of action in Plaintiff's Third Amended Complaint are not based on simple common law deceit; because Plaintiff's cause of action for fraud and deceit, and the other misrepresentations described in Plaintiff's factual allegations, clearly allege Defendants' conscious intent to deceive Plaintiff and to induce his reliance and unknowing participation in their wrongful acts; and because Plaintiff's Complaint clearly sets forth a cause of action for medical negligence due to the failure of Defendants to obtain Plaintiff's truly informed consent, Respondents' claim of "immunity" should be rejected. Even apart from this issue, it is clear that, as set forth in Plaintiff's Complaint, the actions or omissions of public employees Golde and Quan within the scope of their employment give rise to the various causes of action set forth in the Complaint against Golde and Quan individually, and therefore, under California Government Code, §815.2, The Regents as a public entity is liable for those injuries proximally [sic] caused by Golde's and Quan's conduct.

G. THE "PUBLIC POLICY" RATIONALES OFFERED BY RESPONDENTS DO NOT JUSTIFY AWARDING THE WRONGDOING ALLEGED WITH COMMERCIAL PROFIT.

Respondents argue that the profits gained through their deliberate appropriation and unconsented commercial exploitation of a patient's unique cells must be

protected, because to punish the breach of duties and violations of rights alleged would create a host of societal catastrophies. Perhaps the most disingenuous of these "public policy" arguments is Respondents' contention that reversing the dismissal of Plaintiff's Complaint will totally disrupt medical research.

Careful (and less self-serving) consideration of the facts alleged in this case supports no such conclusion. The extraordinary conduct of the Defendants in this case is certainly not typical of the vast majority of researchers. The facts make clear that the commercial research activities based upon Plaintiff's cells were not undertaken for purely academic or altruistic purposes, but were instead pursued and concealed for profit. The "advancement of medical science" and the "free pursuit of intellectual curiosity" could hardly have been best served by the Defendants' secret monopolization of Plaintiff's remarkable cells, the contractual provisions limiting access to the cells to commercial partners, the utilization of public university resources to advance private industry profit, and the patenting of the cell-line itself, let alone the failure to disclose and affirmative concealment of its properties from the patient source.

Defendants' fear that a "voluminous, time-consuming system "of record-keeping will need to be "created" by researchers and the biotechnology industry as a result of this case is equally unwarranted. The Respondents' argument admits that the vast majority of research situations using human specimens involve commonly shared biological materials from a large number of human sources. This case involves a single individual whose totally unique cells were the sole basis of a commercial

development. Identifying and tracing the specimens as originating from Plaintiff was a simple task that was, in fact, easily accomplished. Doing so was the only way the Respondents could hope to protect their own proprietary interests in the commercial products against challenges from competitors. Certainly, any biotechnology company interested in protecting its investments already has ample procedures for tracing whatever unique sources of materials have been employed.

Indeed, a far more genuine threat to medical care and the progress of research would be created should the conduct alleged in this case be legally condoned. Respondents' rationale would undermine the recognized right of patients to self-determination, and grant physician-researchers and their entrepreneurial partners unchecked authority to involve a patient in research and commercial development without the patient-subject's knowledge or consent. It would bestow upon physicians-researchers a legal *right* to unilaterally determine what is best for the patient and for society as determined by the physician's financial interests rather than the informed participation of the patient.

Respondents' inappropriate analogies of the facts of this case to garbage collection and land sales would have this court transform the special relationship between physician and patient into an arm's-length business transaction and replace the fiduciary trust and confidence inherent in the physician-patient relationship with a marketplace ethic of "let the patient beware". There are profound societal concerns and human values underlying the law's fundamental recognition of the physician's fiduciary obligation to the patient, and Respondents' desire to

profit from the violation of those obligations is hardly an adequate justification to dismantle those well-recognized values.

In light of the Respondents' efforts to characterize this case as one of "patient greed", it is important to keep in mind that it was the Respondents, and not the patient, who have chosen to monopolize and commercialize patient's cells and the breakthroughs they made possible. Respondents claim that Plaintiff somehow "abandoned" his unique cells, while contradicted by facts of the Complaint, would not constitute a defense to conversion, nor an "implied consent" to commercial exploitation without the patient's knowledge or participation.

Respondents' analogies to the legal prohibitions against the sale of body parts ignore the simple fact that while you may not be able to market or sell your body parts, that does not give someone else license to take them when they unilaterally decide that they have a profitable use for them. In the context of the trust inherent in the physician-patient relationship, one certainly does not expect that one's physician and his entrepreneurial commercial partner will be the party that deprives you of that fundamental interest, whether it be legally characterized as a property interest, or an interest protected from violation by the recognition of duty.

From a public policy perspective, Respondents' election to secretly transform the relationship into a commercial transaction highlights another danger to research that would flow from Respondents' position. This public policy concern was echoed in the testimony given during the

congressional hearings on the issues raised by this case (CTR 878-883).

The conduct of the Defendants in this case, and the arguments they now offer to justify that conduct, present a real danger of eroding public trust in the methods by which medical and biotechnological researchers obtain human materials, a danger that was warned of in the testimony of Dr. David Blake, Ph.D., Associate Dean for Research at Johns Hopkins University School of Medicine:

> "It would be unfortunate indeed if the exciting advances being made in the field of biotechnology as it relates to human health were to be dampened by a national sense that researchers and universities were profiting from the donations of research materials obtained deceptively from volunteers. While I believe that the current regulations governing informed consent should provide adequate protection, I also believe that the academic community needs to be totally open and honest about these matters. In the final analysis it is the public trust that matters most."

(CTR 883; Testimony of David A. Blake before the Subcommittee on Investigations and Oversight, Committee on Science and Technology, October 29, 1985, at p. 5.)

The danger to research that would be created by legal endorsement and financial reward of the Defendants' conduct in this case was also the subject of the congressional testimony of Dr. Thomas H. Murray, Ph.D., who was then an Associate Professor of Ethics and Public Policy at the Institute for the Medical Humanities at the University of Texas, and is currently the Director of the

Center for Bio-Medical Ethics at Case Western Reserve University School of Medicine:

> "I think the most appropriate model for thinking about our relation with parts of our body is the idea of gift . . . The problem arises when the conditions under which we thought we were making a gift suddenly and dramatically change. The thought of some medical scientist laboring over our now separated spleen or appendix, trying to uncover nature's secrets, or teaching a new generation of physicians how to care skillfully for the sick, does not bother us. It may even give us a little satisfaction, knowing that it was not entirely wasted. But the new possibility has arisen that someone – researcher, university, corporation – may become wealthy as a result of our gift – may win in the biotechnology lottery. And that thought makes many people disgruntled. When the terms of the gift are altered radically, then givers will see their relationship to the recipients in a different light . . .
>
> Biotechnology entrepreneurs should be strongly encouraged to adopt policies that assure that individuals and corporations do not unduly prosper from the gifts of individual's tissues and organs. . . . *In addition, the person should be justly compensated. Not because we "own" our bodies, but because there are two valuable things we want to preserve – the dignity of the human body and its parts, and the gift relationship between science and the public."*

(CTR:881-882; (Testimony of Thomas H. Murray, Ph.D., before the Subcommittee on Investigations and Oversight, U. S. House Committee on Science and Technology, October 29, 1985, pp. 8, 11, 13 and 19) (emphasis added).

The conclusion reached by Dr. Murray highlights the danger to research which would result from legal validation of the conduct alleged in this case: *"If biotechnologists fail to make provisions for a just sharing of profits with the person whose gifts made it possible, the public's sense of justice will be offended and no one will be the winner."* (Congressional testimony of Dr. Murray, quoted in U. S. Congress, Office of Technology Assessment, "New Developments in Biotechnology: Ownership of Human Tissue and Cells – Special Report", OTA-BA-337, [March, 1987] at p. 67) (emphasis added).

Indeed, if the dismissal of the Complaint herein is upheld, the only winners will be that small minority of physician-researchers and their business partners who wish to transcend for personal gain the well-recognized legal, ethical and public policy principles protecting patients from unconsented commercial research and exploitation. To reward violation of those principles with profit would be a grave disservice to research, the medical profession, patients, and the public trust.

III. CONCLUSION.

Based on the facts set forth in the Complaint, the arguments and authorities submitted in Appellant's Opening Brief, and this Reply Brief, the Superior Court's rulings sustaining the Demurrers of the Defendants and dismissing Plaintiff's Third Amended Complaint in this action and entry of judgment thereon should be reversed.

DATED: March 28, 1988

GAGE, MAZURSKY, SCHWARTZ
ANGELO & KUSSMAN

By: Jonathan T. Zackey
JONATHAN T. ZACKEY
Attorneys for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 9454 Wilshire Boulevard, Suite 500, Beverly Hills, California 90212. I am employed in the office of a member of the bar of this court, at whose direction I made this service.

On March 28, 1988 I served the foregoing document described as PLAINTIFF'S REPLY BRIEF on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Richard M. Coleman, Esq.
1801 Avenue of the Stars
Suite 810
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The Honorable
Warren H. Deering
Los Angeles County
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The Honorable
John L. Cole
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Los Angeles, CA 90010

and by placing these sealed envelopes, with postage fully prepaid thereon, in a mail box maintained by the United States Postal Service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 28, 1988, at Beverly Hills, California.

/s/ Michele R. Tozer

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the

within action; my business address is 2808 W. Temple Street, Suite 102, Los Angeles, California 90026.

On March 28, 1988, I served the foregoing document described as PLAINTIFF'S REPLY BRIEF on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follow:

The Supreme Court of the State of California
Los Angeles District
3580 Wilshire Blvd.
Room 213
Los Angeles, CA 90010
(7 copies)
(Hand delivered)

Court of Appeal
Second Appellate District
3580 Wilshire Blvd.
Room 301
Los Angeles, CA 90010
(Original plus 3 copies)
(Hand delivered)

I delivered this envelope by hand to the offices of the addressees.

Executed on March 28, 1988, at Beverly Hills, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_____

_____

Messenger Service (Print)

_____

S ___
Appellate No. B021195

IN THE SUPREME COURT OF CALIFORNIA

JOHN MOORE,

Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC.; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICALS CORPORATION aka SANDOZ, INC, and DOES 1 through 1000, inclusive,

Defendants and Respondents.

RESPONDENT GENETICS INSTITUTE, INC.'S PETITION FOR REVIEW

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* * *

I. ISSUES PRESENTED

Petitioner Genetics Institute, Inc. (hereinafter "G.I.") petitions this Court for review following the opinion of the Court of Appeal, Second Appellate District, Division Four. The petition presents the following issues:

1. Is surgically removed, diseased human tissue tangible personal property?

2. Does a cause of action for conversion arise if diseased human tissue is surgically removed after the patient has executed a valid surgical consent form and is used later in biomedical research without the patient's express consent to conduct such research?

3. Does the execution of a valid surgical consent form result in the abandonment for all purposes of diseased human tissue surgically removed pursuant to that consent form and preclude a claim for conversion?

4. If surgically removed, diseased human tissue is capable of being converted, what is the measure of damages?

5. Should an entirely new cause of action with far-reaching public policy consequences be created by the Legislature rather than by the Court of Appeal?

* * *

Supreme Court No.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JOHN MOORE, Plaintiff and Appellant, vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC.; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICALS CORPORATION aka SANDOZ, INC. and DOES 1 through 1000, inclusive, Defendants and Respondents.	Court of Appeal 2 Civil No. B021195 (Superior Court No. C 513 755)

APPEAL FROM THE JUDGMENT OF THE
SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF LOS ANGELES
HONORABLE WARREN DEERING, JUDGE

PETITION FOR REVIEW

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ISSUE PRESENTED FOR REVIEW

Where a medical researcher, in performing research on tissue removed from a patient with his consent and for therapeutic purposes, develops a product or procedure having potential commercial value, does the patient have a claim for conversion against the researcher on the ground that the patient did not expressly authorize the research?

* * *

S___

B021195

IN THE

SUPREME COURT OF CALIFORNIA

JOHN MOORE,

Plaintiff and Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC.; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICALS CORPORATION aka SANDOZ, INC. and DOES 1 through 1000, inclusive,

Defendants and Respondents.

Appeal from the Superior Court for Los Angeles County
Warren Deering, Judge

PETITION FOR REVIEW OF RESPONDENT
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* * *

ISSUES PRESENTED

1. May a university employee, a medical researcher, who was instructed by a physician to perform studies on tissues excised from the physician's patient in the court of therapeutic treatment, and who subsequently collaborated with the physician in creating and patenting a cell line which may prove beneficial to hundreds of thousands of other patients, be subject to liability for conversion because the physician allegedly failed to fully inform the patient of the uses to which he intended to put the excised tissue?

2. May a medical researcher employed by a university be held liable for conversion for allegedly conspiring with a patient's treating physician, also employed by the university, when the medical researcher was merely performing his or her assigned duties in the course and scope of his or her employment?

3. Is a public employee immune from liability by virtue of Government Code section 822.2, where the action is based on claims of misrepresentation and there is no allegation the employee acted with "actual fraud corruption, or actual malice?"

4. Whether respondent was deprived of her constitutional right to a written opinion where the Court of Appeal reversed a judgment in her favor without addressing any of the arguments asserted in her brief as to why the judgment should be affirmed.

* * *

IN THE

SUPREME COURT OF CALIFORNIA

JOHN MOORE, Plaintiff and Respondent, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICAL CORPORATION AND SANDOZ, INC. and DOES 1 through 1000, inclusive, Defendants and Appellants.	S006987 Court of Appeal No. B021195

PETITION FOR REVIEW

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Respondent, and Petitioner
THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA

* * *

QUESTIONS PRESENTED

1. Does the unqualified consent to surgery at a University teaching and research hospital permit scientific use of therapeutically removed tissues? That is, should there be a rebuttable presumption that such tissue may be used for scientific research or a presumed prohibition against such use?

2. Should the Court extend the definition of personal property and the law of conversion to make tortious a post-surgery research use of body tissues removed with patient consent?

3. When scientific use of therapeutically removed tissue results in commercial utility, is the University's transfer of research results to commercial entities a favored public policy activity *or* a tortious interference with private interests? That is, does person who is the source of human tissue used in medical research have an intangible right over potential commercial utility of the research results?

* * *

S ___
B021195

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

JOHN MOORE,

Plaintiff and Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; etc.; et al.,

Defendants and Respondents.

Consolidated Appeal from Separate Judgments of the Superior Court of Los Angeles County, Central District The Honorable Warren H. Deering and John L. Cole, Judges

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PETITION FOR REVIEW

COVINGTON & CROWE

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* * *

I

ISSUES PRESENTED

1. Is human tissue tangible personal property?

2. Does a cause of action for conversion arise if human tissue, which is removed pursuant to a consent to therapeutic surgery, is later used in biomedical research without first obtaining the patient's express consent to research?

3. Notwithstanding Health and Safety Code section 7054.4, must a medical practitioner return surgically removed diseased[2] human tissue to the patient, if the patient demands its return?

4. If using human tissue in biomedical research, without first obtaining the patient's express consent to research, is conversion, what is the measure of damages? Does the patient have a right to "share in the profits" in

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[2] At MO 8 n.4 the Court of Appeal states, "Although Defendants referred to Plaintiff's spleen as 'diseased,' there is nothing in the Complaint or record to support that characterization. In the Patent, which the Court of Appeal observed was part of the record (MO 11), the condition of Appellant Moore's spleen is described at page 7, lines 13-21, as follows: "In October 1976 the patient underwent splenectomy. The spleen weighed about 6 kg and histopathologic examination showed diffuse infiltration with tartrate-resistant acid-phosphatase-containing hairy cells. Transmission electron microscopy revealed the neoplastic cells to have ultrastructure typical of hairy cells, and several characteristic 'ribosome-lamellar complexes' were identified."

the event a profitable pharmaceutical product is later made from a cell line derived from the patient's tissues?

* * *

Supreme Court No. ___
Appellant No. B021195

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

JOHN MOORE,

Plaintiff and Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, A GOVERNMENTAL ENTITY; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC.; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICALS CORPORATION aka SANDOZ, INC. and DOES 1 through 1000, inclusive,

Defendants and Respondents.

ANSWER TO PETITIONS FOR REVIEW OF DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

LAW OFFICES OF GAGE,
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* * *

I. ADDITIONAL ISSUES PRESENTED FOR REVIEW

Plaintiff and appellant, in the event the Petitions for Review filed herein are granted, requests review of the following issues, in addition to those stated in the Petitions for Review:

1. Was the Court of Appeal correct in ruling that the demurrers to the first cause of action for conversion, the only cause of action considered or decided by the trial court, were improperly sustained, the remanding to the trial court the remaining twelve separate cause of action, which have never been expressly ruled upon?

2. Was the Court of Appeal ruling directing the trial court to reexamine the complaint herein, including consideration of unresolved demurrers, motions to strike, and the potential for amendment with regard to the twelve remaining and separate causes of action set forth therein, proper?

3. Do medical patients have the right to refuse to participate in commercial research and exploitation for profit by their treating physicians?

4. Are medical patients presumed to give "consent" to medical research, commercial exploitation, and/or patenting of their unique cells and genetic material, even when those facts and activities have never been disclosed to the patient?

5. Does the consent of a medical patient to a recommended therapeutic procedure somehow constitute an unqualified "consent" to undisclosed human research, commercial research and exploitation, and/or patenting

of that patient's unique cells and genetic material by the treating physician and that physician's commercial partners, without the patient's knowledge or participation?

Should the Petitions for Review be granted, or the additional questions presented *supra* be answered in the negative, appellant further requests review of the following issues, which would remain unresolved in this case because they have not yet been expressly ruled upon or even considered by the trial court or the Court of Appeal:

6. Does a complaint which alleges that a treating physician obtained access to, patented and commercially exploited for profit a medical patient's unique and valuable cells and genetic material during an extended period of medical care, without informing the patient or obtaining the patient's consent to such activities, state a cause of action for failure to obtain informed consent?

7. Does a complaint which alleges that a treating physician obtained access to a patient's unique and valuable cells and genetic material, by virtue of and in the course of a physician-patient relationship, and patented and commercially exploited them for profit for himself and his commercial partners without disclosing these activities to the patient or permitting the patient to participate financially, state a cause of action for breach of fiduciary duty?

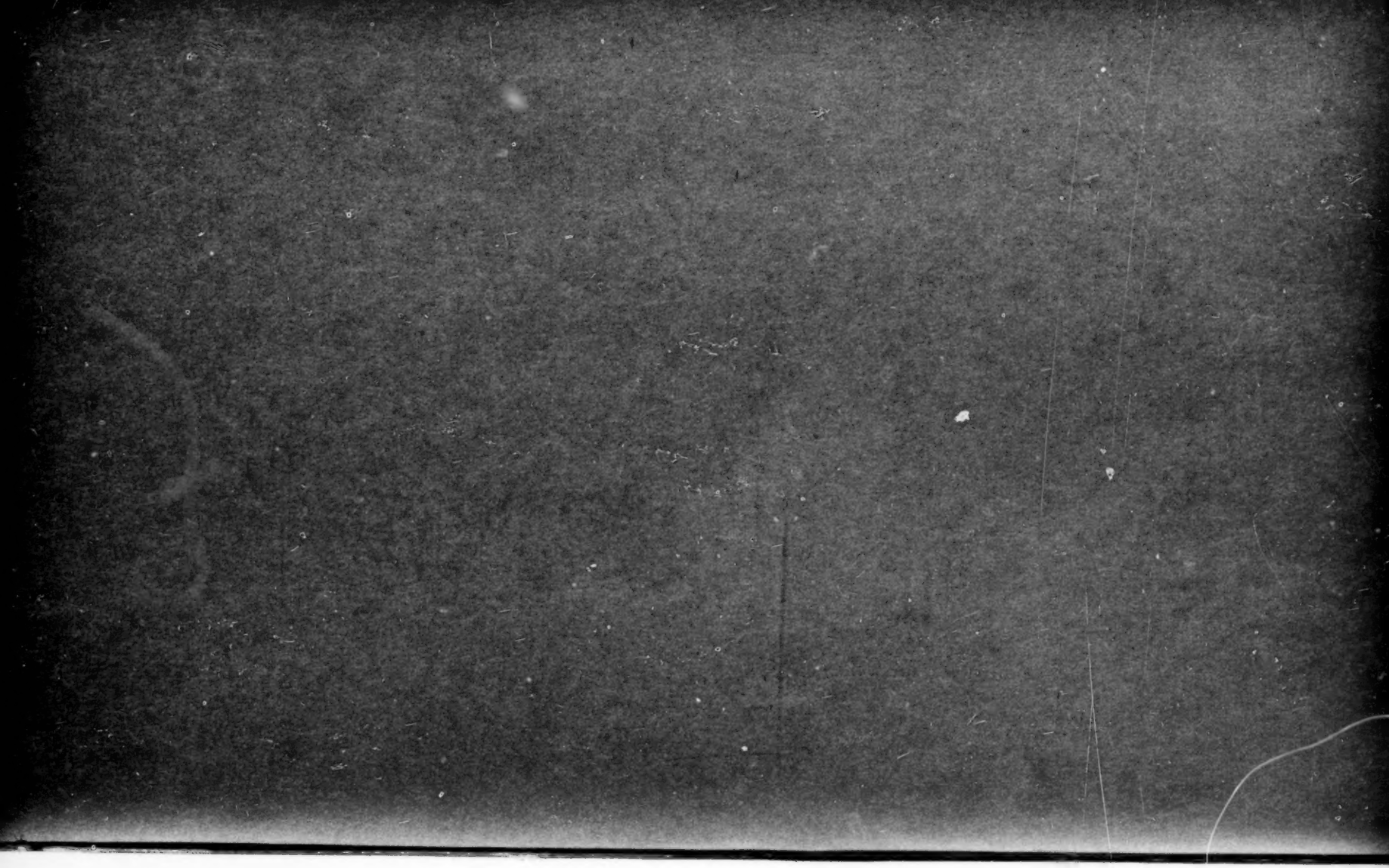
8. Are allegations that a treating physician and his commercial collaborators expropriated a medical patient's unique cells and genetic materials for use in their own commercial and patent activities for profit, without disclosing to the patient the unique characteristics or commercial value of his cells, while inducing him

to continue to provide them with samples of those materials in the context of medical care, sufficient to constitute a cause of action for fraud and deceit?

9. Does a complaint which alleges that a treating physician and his commercial partners obtained significant competitive advantage in the development of an extremely profitable biotechnology product utilizing a medical patient's unique cells and genetic material without that patient's knowledge or consent, state a cause of action for unjust enrichment?

10. Similarly, do the allegations set forth in Plaintiff's Third Amended Complaint sufficiently plead the remaining eight causes of action which also have yet to be considered or ruled upon, i.e., causes of action for quasi-contract, bad faith breach of the implied covenant, intentional infliction of emotional distress, negligent misrepresentation, intentional interference with prospective advantageous economic relationships, slander of title, accounting, and declaratory relief?

* * *



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No. 90-1037

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOHN MOORE,

Petitioner,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, DAVID W. GOLDE, M.D., SHIRLEY G. QUAN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

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REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

This case presents an important issue of constitutional law that has not been, but should be, settled by this Court: whether the Fifth Amendment requires a State to provide just compensation for the nonconsensual taking of uniquely valuable human bodily materials, when those materials are subsequently exploited by the State for commercial gain. Resolution of this issue is critical to the orderly and humane development of biotechnology and medical science. None of respondents' arguments supports denial of certiorari.

ARGUMENT

1. This Court's guidance is badly needed in this confused area of constitutional law. *See* Pet. 19-20. As one commentor recently observed, "[r]apid advances in biotechnology and medical science are creating new uses for many bodily tissues that were once thought to have no value beyond their original functions." [1] This burgeoning technological and scientific area has become commercialized, "creat[ing] a market place in which human tissues are routinely sold to and by scientists, physicians and others." *Brotherton v. Cleveland*, 923 F.2d 477, slip op. at 12 (6th Cir. 1990). This lucrative new industry [2] has brought with it previously unencountered legal issues. In particular, courts are more and more often confronting the fundamental issue whether an individ-

[1] Note, "She's Got Bette Davis['s] Eyes": Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses, 90 Colum. L. Rev. 528, 528 (1990) [hereafter "Note"].

[2] As of 1985, over $2.6 billion had been invested in biotechnology firms. Tompkins, *Capitalizing in Life*, Sci. Dig., June 1986, at 33. That number has surely been dwarfed by investment during the past five years. The market potential of products from the cell-line created from petitioner's cells has been predicted to be hundreds of millions of dollars by the 1990s. Hundreds of thousands of dollars have already been paid to respondents based on products derived from petitioner's body.

ual's blood, tissues and other bodily substances—the raw materials for this new industry—fall within the ambit of the constitutional protections afforded property by the Fifth and Fourteenth Amendments.

Since the filing of Moore's petition, the Sixth Circuit has ruled that an Ohio woman has a constitutionally protected property interest in her deceased husband's corneas. *Brotherton v. Cleveland*, 923 F.2d 477 (reversing dismissal of widow's section 1983 claim for coroner's wrongful removal of corneas for use by eye bank). Thus, pursuant to the Sixth Circuit's decision, a person has a protected property interest in the body parts of *another deceased* individual, whereas, under the California Supreme Court's decision, an individual does not have a protected property interest in his *own* body parts *while living*. The incongruity of these disparate conclusions illustrates the need for this Court to resolve the fundamental constitutional question presented here: whether the Fifth Amendment embraces an individual's interest in his economically valuable bodily materials.

Respondent Quan forthrightly admits that this issue is "of great public importance." Quan Opp. 5 n.2. Respondent Golde's ill-conceived "policy arguments" against granting certiorari also concede the importance of this case: like Quan, he asserts that medical research will grind to a halt should physicians and researchers be compelled to compensate the patients whose bodily organs, cells, and fluids they excise and exploit for enormous financial gain. Golde Opp. 20-21.[3] Indeed, Golde main-

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[3] Golde's suggestion that the Court's decision will not affect private entities is clearly wrong. Golde Opp. 20 n.12. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), for example, this Court analyzed under the Just Compensation Clause a California Supreme Court decision refusing to recognize a private shopping center's trespass action against private citizens intending to engage in speech activity on the premises. *See id.* at 82 ("[T]here has literally been a 'taking' of the right [to exclude others] to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights on shopping center property.") Similarly, were Golde a

tains that achieving uniformity is so important it necessitates adoption of uniform laws by state legislatures. *Id.* 20 n.12. But the nonconsensual taking of a person's organs, blood, bone marrow aspirate, and/or other bodily substances, for the entrepreneurial benefit of the State raises profound Fifth Amendment concerns that are the special province of this Court to resolve.

2. Respondents admit—as they must—that Moore's Fifth Amendment claim ripened only when the State denied him just compensation. As this Court has explained, "the State's action is not 'complete' in the sense of causing a constitutional injury unless or until the State fails to provide an adequate postdeprivation remedy for the property loss." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (internal quotation omitted). *See id.* at 194 n.13 ("[N]o constitutional violation occurs until just compensation has been denied.").

Nevertheless, respondents maintain that Moore somehow "waived" his Fifth Amendment claim by not raising it before the constitutional injury was complete. This argument is flatly contradicted by *Williamson County*, where this Court made plain that "the property owner *cannot claim* a violation of the Just Compensation Clause until it has used the [state] procedure and been denied just compensation." *Id.* at 195 (emphasis added). Until the California courts definitively denied Moore compensation, he had no Fifth Amendment claim to waive. Moore raised his claim as soon after the "taking" as possible: he alluded to the constitutional claim in his brief to the California Supreme Court, and squarely advanced it in his petition for rehearing after that court definitively denied his prayer for just compensation. Pet. App. 97a, 99a-100a.

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private physician, the California Supreme Court's ruling that state law affords Moore no property interest in his bodily substances would still constitute a "taking."

None of the cases cited by respondents holds that a takings claim must be raised in the state proceeding prior to the denial of compensation. Their reliance upon this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), is misplaced. Contrary to respondents' claims, *First English* did not set forth "the appropriate procedure for preserving a federal taking claim in state court." Golde Opp. 8. To the contrary, because the federal issue had been considered and decided by the state court there, this Court expressly did "not consider how or when the question was raised." 482 U.S. at 313 n.8.[4]

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[4] Quan's reliance on this Court's nearly 50-year-old decision in *Bailey v. Anderson*, 326 U.S. 203 (1945), is similarly misplaced. Quan's long quotation from the decision adroitly excises the basis for the Court's holding. *Bailey* reached this Court *on appeal*. The Court noted that in the state courts, the appellant had "failed to draw in question the constitutional validity of any statute as is required by § 237(a) of the Judicial Code," *id.* at 206, and the Court could not be sure that the state supreme court had passed upon that issue, *id.* at 206-07. In any event, the Court was not convinced that the act about which appellant complained—failure to include interest in an award—had actually occurred. The Court thus held that it was "without jurisdiction of the appeal." *Id.* at 207. This case comes to this Court pursuant to its *certiorari jurisdiction*, and petitioner need not call into question the validity of any state statute. Moreover, it is very clear that California has conclusively refused petitioner compensation for the conversion of his body parts by the State.

Golde's reliance on *Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989), is perplexing. In *Peduto*, a property owner brought an inverse condemnation action in state court together with several federal constitutional claims, including a Fifth Amendment takings claim. The state court heard and rejected the federal constitutional claims on the merits. *Id.* at 728. The Third Circuit held that the State's claim preclusion rules did not allow the property owner to relitigate the same issues in federal court. *Id.* at 729. Nothing in the decision suggests that the property owner was *required* to litigate his federal takings claim at any particular phase of the state court proceeding, or that the state court was *required* to rule upon the merits of that claim. The court held only that having done so, the property owner could not reassert identical claims in a separate complaint in federal court.

Indeed, Moore's takings claim was more clearly presented below than was the takings claim deemed adequately raised and reviewed by this Court in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). There, the property owner made one reference to unspecified "pertinent provisions of the *Florida Constitution* and its Federal counterpart," in its opening brief at the intermediate appellate level, and made "due process" arguments—again without citing the Federal Constitution—in its reply brief. *Id.* at 159 n.5 (emphasis in original). In the state supreme court, there was no specific reference to the *federal* Constitution in either the briefs or the court's opinion, although the court mentioned the argument that the statute at issue "constitute[d] either a taking without due process of law or an unlawful tax" and concluded that there was "no unconstitutional taking." *Id.* Based on this record, this Court ruled it could properly consider the federal takings issue (and held a taking had occurred).[5] Here, Moore did far more: He clearly invoked the *federal* Constitution, asserting the Fifth Amendment and the language of "due process" (as in *Webb's Fabulous Pharmacies*) in his brief before the California Supreme Court. Pet. App. 97a. And he alleged an unconstitutional "taking without just compensation" under the *federal* Constitution at the first opportunity after the violation occurred. Pet. App. 99a-100a.

Respondent Regents' contention that Moore waived his takings claim by not bringing an inverse condemnation action is contradicted by the many cases in which this Court has addressed Fifth Amendment claims in other contexts.[6] For example, the takings issue in *PruneYard*

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[5] *Webb's Fabulous Pharmacies* clearly refutes Quan's contention that Moore was required to advance his federal takings claim in his complaint. *See* Quan Opp. 6 n.4.

[6] The sole case upon which Regents relies for this proposition, *Cassettari v. Nevada County, Cal.*, 824 F.2d 735 (9th Cir. 1987), held only that until a property owner seeks to obtain compensation for an alleged taking pursuant to state procedures, his Fifth

arose in the context of a lawsuit by handbill distributors alleging a First Amendment and state constitutional right of access to a private shopping center. The Court explicitly stated that the action was not a "condemnation case," but nevertheless concluded that the Fifth Amendment issue was properly presented. 447 U.S. at 82 n.5. *See also Webb's Fabulous Pharmacies, supra* (addressing takings claim arising in an interpleader action pertaining to a sales agreement).

Moore sought compensation through his conversion claim for the total extinguishment of his property interest in his bodily substances.[7] The California Supreme Court reversed the intermediate appellate court and sustained the demurrers on that claim, on the ground that Moore had no property interest in his organs, cells, and bodily fluids once removed. In so holding, the court made clear that for that reason a claim for inverse condemnation (compensation for exercise of the power of eminent domain) was not available either. *See* Pet. App. 36a n.44. Clearly, Moore satisfied his obligation under *Williamson County* to seek compensation through state procedures. There has been no waiver.

3. Respondents do not dispute that the California Supreme Court finally and definitively resolved Moore's conversion claim, sustaining the demurrers and preclud-

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Amendment takings claim is "premature." *Id.* at 737-38. Although the court observed that an inverse condemnation claim was available to the property owner, *id.* at 738, the court did *not* hold that only invocation of that proceeding would be sufficient.

[7] Contrary to the Regents' suggestion, Moore's invocation of this conversion claim is entirely consistent with his takings claim. *See* Regents Opp. 9-10. At least one commentator has suggested that the law of conversion provides the correct method for ascertaining "just compensation" for the taking of bodily substances. Note, *supra* n.1, at 562. *See also Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 n.14 (1984) (instructing that methods of compensation other than fair market value immediately prior to the taking are appropriate "when market value [is] too difficult to find, or when its application would result in manifest injustice to owner or public").

ing amendment of the complaint on that claim. Nevertheless, they contend that the court's decision is not a final judgment within the meaning of 28 U.S.C. § 1257(a) because the court remanded Moore's entirely separate causes of action for breach of fiduciary duty or lack of informed consent. But, as in *First English*, the state supreme court has made a distinct ruling that controls the takings issue and will survive any further state-court proceedings: Moore is not entitled to compensation for the State's unconsented-to extraction and commercial exploitation of his bodily substances. *See* 482 U.S. at 309 n.3. Consequently, as in *First English*, that ruling is reviewable by this Court.[8]

4. Finally, respondents argue, on the merits, that the state court's holding that an individual retains no property interest in his bodily substances once removed precludes a finding that an unconstitutional taking occurred. Regents Opp. 4-8. This argument is wrong for two reasons. *First*, as the Sixth Circuit's decision in *Brotherton v. Cleveland* makes plain, although state law plays a crucial role in identifying interests protected under the Fifth Amendment, the issue whether a constitutionally protected property interest exists is ultimately a matter of *federal* law. Slip op. at 13, citing *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 9 (1978). Indeed, the *Brotherton* court held that where the State conferred

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[8] Contrary to respondents' contentions (*see* Regents Opp. 1, 2; Golde Opp. 1) this Court cannot assume Moore validly consented to the surgical removal of his spleen. This case arises on demurrer and the allegations in Moore's complaint must be accepted as true: Moore alleges that his consent was fraudulently obtained and therefore neither "informed" nor valid. Moreover, Moore's conversion and takings claims pertain not only to the removal of his *spleen* without informed consent, but also the subsequent removal of *his blood and other bodily fluids without informed consent.* Complaint ¶¶ 30-53; Pet. App. 110a-126a. The complaint asserts these extractions had no *medical* purpose whatsoever. Complaint ¶¶ 33-34; Pet. App. 111a. Therefore, even if the trier of fact ultimately concludes that Moore knew of and consented to respondents' use of his excised spleen, Moore's allegations regarding the nonconsensual extraction of his other bodily substances would remain.

a "possessory right" to her deceased husband's body, a widow has a property interest protected by the federal Constitution *despite* the State's failure to classify it as such. *Id.* at 14.

Second, as discussed in the Petition, the aggregate of rights and interests recognized by California law rises to the level of a constitutionally cognizable property interest in one's bodily substances. *See* Pet. 15-16, 18-19. *See also Brotherton*, slip op. at 14 (State's Uniform Anatomical Gift Act evidences property right in bodily organs). Respondents entirely ignore these many indicia, all of which created Moore's reasonable expectation that he could control the use of his bodily materials, and reap a reasonable return for their commercial use. *See* Note, *supra* n.1 (individuals have a property interest in their bodily substances and the commercially exploitative uses to which they are put); Note, Toward the Right of Commerciality: Recognizing, Property Rights in the Commercial Value of Human Tissue, 34 U.C.L.A. L. Rev. 207 (1986) (same).[9]

Golde and Quan recognize that the state court's finding is not conclusive, but nevertheless argue that it disposes of Moore's federal claim because the court's decision " 'rests upon a fair or substantial basis.' " Golde Opp.

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[9] Golde argues disingenuously that "bodily materials lack the attributes ordinarily associated with property." Golde Opp. 15 n.6. As Golde is fully aware, Moore's cells have substantial intrinsic monetary value. More generally, although there are some limitations on the purchase and sale of organs (as there are regulations on the sale of many other types of property), individuals have for years sold their bodily substances—such as blood, semen, urine, sweat, saliva, and skin. *See* R. Scott, The Body as Property 190 (1980); *United States v. Garber*, 589 F.2d 843, 846 (5th Cir.) (discussing woman whose blood contained a rare antibody and who earned up to $1,600 per bleed and $200 a week, plus $25,000 cash, 1000 shares of stock, and use of a car in exchange for regular extractions of blood plasma), *rev'd on other grounds*, 607 F.2d 92 (5th Cir. 1979) (*en banc*). "In the biomedical marketplace, human tissue is commonly traded and sold and often is the subject of commercially valuable contracts." Note, Toward the Right of Commercially, 34 U.C.L.A. L. Rev. at 219.

14, quoting *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944). They contend that recognizing a retained property interest in Moore's cells after their removal would conflict with California Health and Safety Code 7054.4. But, as Moore demonstrated in his Petition, Section 7054.4 speaks only to the means by which removed bodily substances may be disposed of "*following the conclusion of scientific use.*" The provision does not in any way address the scientific use to which the substances may be put or who may exploit them for scientific purposes. It therefore cannot negate the individual's self-evident interest in controlling the commercial uses to which his organs and bodily fluids are to be put. Golde's response to this ineluctable conclusion is nonsensical. *See* Golde Opp. 16 n.7.

Moreover, respondents' argument, like the California Supreme Court's holding, misses the point. Moore argues not that he "retained" a property interest in his bodily material *once removed*, but that he had a property interest in his bodily materials *while they were part of his body* that gave him a right to control whether and for what purposes those materials would be extracted. The crux of Moore's claim is that his spleen and bodily fluids were extracted without informed consent; the "taking" was the unconsented-to removal of this valuable material from his body. As Golde effectively admits, the California Supreme Court recognized that an individual has a property interest—"a right of possession and control"—under California law in material that is part of his body. *See* Golde Opp. 15 n.6. The State deprived Moore of this right of possession and control—a right, Golde admits, that "resides at the very core of a property interest." *Id.* 17.[10] Yet the state court concluded that

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[10] The state court ruled Moore had a right to be informed of respondents' intentions prior to consenting to extraction. With such knowledge, Moore presumably could have sold the rights to the materials respondents coveted. By failing to inform him, and then declaring him to have no continuing rights once the material was

this property interest evaporates upon the material's non-consensual extraction, only to rematerialize in the hands of Golde, Quan, and the State as property surely protected from conversion by third parties. This uncompensated transformation of private property into public property—based entirely on *ipse dixit*—contravenes the principles established in *Webb's Fabulous Pharmacies* and *Demorset*. *See* Pet. 20-21.

CONCLUSION

For all the foregoing reasons, and for the reasons stated in the Petition for a Writ of Certiorari, this Court should grant the Petition.

Respectfully submitted,

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March 1991

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extracted without consent, the State deprived Moore of the right to sell the materials prior to extraction. That deprivation is a quintessential taking of property.